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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]2

No. [illegible] 14

MERCANTILE NATIONAL BANK AT DALLAS,
APPELLANT,

vs.

C. H. LANGDEAU, RECEIVER.

No. [illegible] 15

REPUBLIC NATIONAL BANK OF DALLAS,
APPELLANT,

vs.

C. H. LANGDEAU.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF TEXAS

FILED MAY 15, 1961.
JURISDICTION POSTPONED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 90

MERCANTILE NATIONAL BANK AT DALLAS,
APPELLANT,

vs.

C. H. LANGDEAU, RECEIVER.

No. 91

REPUBLIC NATIONAL BANK OF DALLAS,
APPELLANT,

vs.

C. H. LANGDEAU.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF TEXAS

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[fol. 1]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 110,917

C. H. LANGDEAU, Receiver

v.

BEN JACK CAGE, ET AL.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—
Filed July 21, 1958

To the Honorable Judge of Said Court:

Comes now C. H. Langdeau, in his representative capacity as the duly authorized and acting Receiver of ICT Insurance Company and as representative of ICT Insurance Company and its creditors, claimants, policyholders and stockholders and as a representative of the public interest and ICT Insurance Company in receivership, plaintiff, and complaining of the hereinafter-named defendants, and for cause of action would respectfully show to the Court the following:

1.

That the plaintiff, C. H. Langdeau, is a resident of Travis County, Texas. On February 20, 1957, in an action in the nature of a quo warranto proceeding by the State of Texas, such action being styled: The State of Texas v. ICT Insurance Company, et al., being Cause No. 106,184, on the docket of the 98th District Court of Travis County, J. D. Wheeler was by order of said Court appointed Temporary Receiver of and for said ICT Insurance Company, pending further orders of the Court; that said J. D. Wheeler duly qualified as Temporary Receiver of said ICT Insurance Company on February 20, 1957, and acted in such capacity until March 5, 1957, at which date a final order was entered in said Cause appointing the said J. D. Wheeler as

Permanent Receiver of ICT Insurance Company; that the said J. D. Wheeler duly qualified as such Permanent Receiver on March 5, 1957, and thereafter acted continuously in such capacity until March 4, 1958, on which date the said [fol. 2] J. D. Wheeler resigned. By order of the said 98th District Court in said Cause dated March 4, 1958, James M. Williamson was duly appointed Receiver of ICT Insurance Company and he duly qualified as such Receiver on the same day and acted in such capacity until June 10, 1958. On July 21, 1958, C. H. Langdeau was appointed as Receiver of ICT Insurance Company and on the same date C. H. Langdeau qualified as Receiver and since said appointment he has been acting continuously in such capacity; that in said Order of Appointment, C. H. Langdeau as such Receiver of the ICT Insurance Company, succeeded to all of the properties, rights, and choses in action which exist in favor of ICT Insurance Company, and the creditors, claimants, policyholders, and stockholders of ICT Insurance Company; and under the laws and orders of the 98th District Court the said C. H. Langdeau was authorized to maintain this action for the wrongful acts committed as against ICT Insurance Company and its claimants, creditors, policyholders and stockholders in such representative capacity granted to them under the laws and orders of the court. The Receiver herein sues to recover damages to ICT Insurance Company and its claimants, creditors, policyholders and stockholders in the amount of $15,000,000.00, caused by the illegal, wrongful, fraudulent and negligent acts of the defendants as hereinafter pleaded.

2.

That the defendants herein complained of and their residences where service of citation may be had are as follows:

[fol. 3] Ben Jack Cage, Dallas County, Texas
J. Byron Saunders, Smith County, Texas
Garland A. Smith, Travis County, Texas
Nile E. Ball, Harris County, Texas
Pierce P. Brooks, Dallas County, Texas
B. F. Biggers, Dallas County, Texas
Max Wayne Rychlik, Travis County, Texas

Lester F. Hall, Dallas County, Texas
James E. Dunne, Louisville, Kentucky
James G. Cage, High Point, North Carolina
J. A. McFaddin, Harris County, Texas
Paul C. Sparks, Harris County, Texas
Charles D. Dunne, Louisville, Kentucky
James E. Dunne, II, Travis County, Texas
Henry J. Stites, Louisville, Kentucky
Francis J. Knoll, Philadelphia, Pa.
Stuart B. Hopps, San Francisco, California
T. K. Irwin, Sr., Dallas County, Texas
J. N. Fisher, Dallas County, Texas
John G. Vaughan, Dallas County, Texas
Clyde E. Belin, St. Louis, Missouri
Edmund B. Welshans, Clayton, Missouri
W. Leslie Miller, Clayton, Missouri
C. R. Saunders, Bell County, Texas
L. A. Townsend, Galveston County, Texas
Walter Wideman, Dallas County, Texas
Ray Johnson, Gregg County, Texas
Bill Sams, Knox County, Texas
[fol. 4] George Webber, El Paso County, Texas
T. W. Wheeler, Bexar County, Texas
Stanley E. Prichard, McLennan County, Texas
C. C. Hill, Dallas County, Texas
Charlotte Morgan Graham, Dallas County, Texas
W. A. Combs, Harris County, Texas
William V. Barker, Dallas County, Texas
Albert Boggess, Dallas County, Texas
F. E. MacCurdy, Dallas County, Texas
John B. Mills, Dallas County, Texas
C. A. Mohrle, Dallas County, Texas
C. D. Mohrle, Dallas County, Texas
Cecil Mills, Dallas County, Texas
Richard Dean Hawn, Dallas County, Texas
Frank G. Newman, Dallas County, Texas
W. J. Noad, Dallas County, Texas
Marcus Loftis, Travis County, Texas
Kenneth Mabry, Nueces County, Texas
J. A. McMahon, Jr., Little Rock, Arkansas
P. C. Klein, Jefferson County, Texas

Vernon Evans, Jefferson County, Texas
Walton N. Newman, Galveston County, Texas
Frank Owens, Harris County, Texas
Claude Ritchie, Wichita County, Texas
Ed Weimar, Bexar County, Texas
C. O. Blackburn, Dallas County, Texas
Walter Monroe, Jefferson County, Texas
L. "Bud" Laird, Harris County, Texas
[fol. 5] Arthur Noble, Dallas County, Texas
Gaines R. Terrell, Tarrant County, Texas
Doris Baker, Harris County, Texas
Charles Jones, Dallas County, Texas
W. L. Pickens, Dallas County, Texas
Frank Yeager, Galveston County, Texas
Steve Booke, Dallas County, Texas
Robert F. Fly, Harris County, Texas
J. H. Abright, Dallas County, Texas
E. C. Gones, Jefferson County, Texas
C. L. Wisseman, Dallas County, Texas
Carl Knight, El Paso County, Texas
James J. Brophy, Dallas County, Texas
John P. Moran, Boston, Massachusetts
Arthur M. Brown, San Francisco, California
Wm. Ross Kennedy, Dallas County, Texas
A. B. Dupuy, New Orleans, Louisiana
L. W. Kellogg, Harris County, Texas
J. K. Leaman, Dallas County, Texas
O. Z. Gulledge, Bexar County, Texas
Marshall Bivens, Tulsa, Oklahoma
Robert F. Talbott, Los Angeles, California
William J. Harris, Dallas County, Texas
Freeman Everett, Harris County, Texas
William A. Cullen, Cameron County, Texas
W. S. East, Tom Green County, Texas
E. A. McSpadden, Dallas County, Texas
Eddie Gross, Jefferson County, Texas
[fol. 6] Fred Lucas, Harris County, Texas
W. C. McMasters, Harris County, Texas
Arthur B. Eaton, Tuckahoe, New York
E. B. Kelley, Oklahoma City, Oklahoma

R. L. Ferguson, Jackson, Mississippi
Harry J. Aden, Salem, Oregon

Mercantile National Bank at Dallas, a national banking corporation organized and existing under the laws of the United States with its principal place of business at Dallas, Dallas County, Texas, by service upon Milton F. Brown, its president, or any of its officers.

Republic National Bank of Dallas, a national banking corporation organized and existing under the laws of the United States with its principal place of business at Dallas, Dallas County, Texas, by service upon James Aston, its president, or any of its officers.

Jack Cage and Company, Inc., a foreign corporation, organized under the laws of Alabama with its principal place of business at Birmingham, Alabama, by service upon Ben Jack Cage or any of its officers.

Jack Cage and Company, Inc., a corporation organized under the laws of the State of Texas with its principal place of business at Dallas, Dallas County, Texas, by service upon Ben Jack Cage or any of its officers.

Continental Union Insurance Company, a foreign insurance company organized under the laws of Alabama with its principal place of business at Birmingham, Alabama, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and any of its officers and agents.

Continental Union Life Insurance Company, a foreign insurance company organized under the laws of Alabama with its principal place of business at Birmingham, Ala- [fol. 7] bama, by service upon the Commissioner of Insurance, State of Texas, and any of its officers and agents.

Equitable Realty Corporation, a private corporation organized under the laws of the State of Texas, with its principal place of business at Austin, Travis County, Texas, by service upon any of its officers.

Narragansett Insurance Company, a foreign insurance company, operating under the laws of Rhode Island, with

its principal place of business at Providence, Rhode Island, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, or upon any of its officers and agents.

American General Insurance Company, a Texas Insurance Corporation, organized and operating under the laws of Texas, with its principal place of business at Houston, Harris County, Texas, by service upon any of its officers and agents.

Fidelity and Deposit Company of Maryland, a foreign insurance company, organized and operating under the laws of Maryland, with its principal place of business at Baltimore, Maryland, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, or upon any of its officers and agents.

Unitex Industries, Inc., a private corporation, organized and operating under the laws of Texas with its principal place of business at Ft. Worth, Tarrant County, Texas, by service upon James O. Toler, its president, or any of its officers.

Commercial and General Fire and Marine Insurance Company, a foreign corporation, with its principal place of business at Tangier, Africa, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and any of its officers and agents.

[fol. 8] The London and Edinburgh Insurance Company, Ltd., a foreign corporation, organized under the English laws, with its principal place of business at London, England, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, their agent, Mendes & Mount, Attorneys at Law, New York, New York, and any of its officers and agents.

Guardian Insurance Company, a foreign insurance company, organized under the laws of South Dakota, with its principal place of business at Sioux Falls, South Dakota, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, or any of its officers and agents.

Combined Investments, Inc., a private corporation, organized under the laws of Texas, with its principal place of business at Dallas County, Texas, by service upon Ben Jack Cage or any of its officers.

Triangle Research and Advertising, Inc., a foreign corporation, organized under the laws of Nevada, by service upon Ben Jack Cage, Francis J. Knoll, or any of its officers.

Oxford Corporation, a foreign corporation, organized under the laws of Nevada, with its principal place of business at Dallas, Dallas County, Texas, by service upon Ben Jack Cage or any of its officers.

Jack Cage and Company, a foreign corporation, organized under the laws of Delaware, with its principal place of business at Dallas, Dallas County, Texas, by service upon Ben Jack Cage or any of its officers.

Bankers Bond Company, a foreign corporation, organized under the laws of Kentucky, with its principal place of business at Louisville, Kentucky, by service upon any of its officers.

A. R. A. Manufacturing Company, Inc., a private corporation, organized under the laws of Texas, with its principal place of business in Ft. Worth, Tarrant County, Texas, by service upon James O. Toler, its president, or any of its officers.

[fol. 9] Cumberland Apartment Company, a foreign corporation, organized under the laws of Kentucky, with its principal place of business at Louisville, Kentucky, by service upon any of its officers.

Federal Underwriters, a private corporation, organized under the laws of the State of Texas, with its principal place of business at Dallas, Dallas County, Texas, by service upon any of its officers.

Compania General de Serguros La Comercial, a foreign insurance company, organized under Cuban laws, with its principal place of business at Havana, Cuba, by service upon the Commissioner of Insurance, State Board

of Insurance, State of Texas, or upon any of its officers and agents.

Leadenhall Corporation, a foreign corporation, organized under the laws of Delaware, with its principal place of business at Dallas, Dallas County, Texas, by service upon Ben Jack Cage or any of its officers.

National Bankers Life Insurance Company, an insurance company, organized and operating under the laws of the State of Texas, with its principal place of business at Dallas, Dallas County, Texas, by service upon Lester F. Hall, its president, or any of its officers.

All States Life Insurance Company, an insurance company, organized and operating under the laws of the State of Texas, with its principal place of business at Dallas, Dallas County, Texas, by service upon B. F. Biggers or any of its officers.

Missouri Union Insurance Company, a foreign insurance company, organized and operating under the laws of the State of Missouri, with its principal place of business at Clayton, Missouri, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and any of its officers and agents.

Missouri Union Corporation, a foreign corporation, organized under the laws of Missouri with its principal place of business at Clayton, Missouri, by service upon [fol. 10] any of its officers.

General Development Corporation, a private corporation organized under the laws of the State of Texas, with its principal place of business at Dallas, Dallas County, Texas, by service upon any of its officers and agents.

Beneficial Guaranty Life Insurance Company, a foreign insurance company, organized under the laws of Alabama, with its principal place of business at Montgomery, Alabama, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and any of its officers and agents.

Minster Insurance Company, Ltd., a foreign insurance company, organized under foreign laws, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and their agent, Mendes and Mount, Attorneys at Law, New York, New York, and any of their officers and agents.

John C. Paige and Company, a private corporation, organized under the laws of Massachusetts, with its principal place of business at Boston, Massachusetts, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

Mendes and Mount, Attorneys at Law, a partnership, New York, New York, by service upon any of their partners, representatives and agents.

C. E. Heath and Company, Ltd., a foreign corporation, organized under the laws of England, with its principal place of business at London, England, by service upon Mendes and Mount, Attorneys at Law, New York, New York, their agents, and upon any of their officers and agents.

Harvey Trinder and Van Ommeren, Ltd., a foreign corporation, organized under the laws of England, with its principal place of business at London, England, by service upon Mendes and Mount, Attorneys at Law, New York, New York, and any of its officers and agents.

[fol. 11] Lloyds of London and the Underwriters doing business at Lloyds of London, England, through their attorney-in-fact, a Lloyds organized and operating under the English laws, with its principal place of business at London, England, by service upon their agent, Mendes and Mount, Attorneys at Law, New York, New York, and upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon their officers and agents.

Midland Employers Mutual Assurance, Ltd., a foreign insurance company, organized under foreign law, by ser-

vice upon the Commissioner of Insurance, State Board of Insurance, State of Texas, upon its agent, Mendes and Mount, Attorneys at Law, New York, New York, and upon its officers and agents.

The Orion Insurance Company, Ltd. a foreign insurance company, organized under the laws of England, with its principal place of business at London, England, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

Drake Insurance Company, Ltd., a foreign insurance company, organized under foreign laws by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, upon Mendes and Mount, Attorneys at Law, New York, New York, its agents, and upon its officers and agents.

Sphere Insurance Company, Ltd., a foreign insurance company, organized under foreign laws by service upon the [fol. 12] Commissioner of Insurance, State Board of Insurance, State of Texas, upon Mendes and Mount, Attorneys at Law, New York, New York, its agents and upon its officers and agents.

Insurance Corporation of Ireland, Ltd., a foreign insurance company, organized under the laws of Ireland, with its principal place of business at Dublin, Ireland, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, upon Mendes and Mount, Attorneys at Law, New York, New York, its agents, and upon its officers and agents.

Steadfast Insurance Company, Ltd., a foreign insurance company, organized under the laws of Australia, with its principal place of business at Victoria, Australia, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

Seven Provinces Insurance Company, Ltd., a foreign insurance company, organized under the laws of Holland, with its principal place of business at The Hague, Holland, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent and upon its officers and agents.

Sovereign Marine and General Insurance Company, Ltd., a foreign insurance company, organized under foreign laws, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New [fol. 13] York, its agent, and upon its officers and agents.

General Reinsurance Syndicate, Ltd., a foreign insurance company, organized under foreign laws, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent and upon its officers and agents.

Progress Insurance Company, Ltd., a foreign insurance company, organized under foreign laws, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent and upon its officers and agents.

United Benefit Fire Insurance Company, a foreign insurance company, organized under the laws of Nebraska, with its principal place of business at Omaha, Nebraska, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

Stewart Smith and Company, a private corporation, organized under the laws of New York, with its principal place of business at New York, New York, by service upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

Andrew Weir Insurance Company, Ltd., a foreign insurance company, organized under the laws of England, with its principal place of business at London, England, by [fol. 14] service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

English and American Insurance Company, Ltd., a foreign insurance company, organized under the laws of England, with its principal place of business at London, England, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon Mendes and Mount, Attorneys at Law, New York, New York, its agent, and upon its officers and agents.

National Surety Corporation, a foreign insurance corporation, organized and operating under the laws of New York, with its principal place of business at New York, New York, by service upon the Commissioner of Insurance, State Board of Insurance, State of Texas, and upon its officers and agents.

The Estate of Garth W. Daniel, deceased, by service upon the Administrator or Executor or representative of the Estate of Garth W. Daniel, deceased, Travis County, Texas.

The Estate of Joel H. Berry, deceased, by service upon the Administrator or Executor or representative of the Estate of Joel H. Berry, deceased, Harris County, Texas.

The Estate of J. M. West, deceased, by service upon the Administrator or Executor or representative of the Estate of J. M. West, deceased, Harris County, Texas.

[fol. 15] 3.

For the purposes of brevity, C. H. Langdeau, Receiver of ICT Insurance, will hereinafter be referred to as "Receiver," ICT Insurance Company of Dallas, Dallas County, Texas (formerly The Insurance Company of Texas), will hereinafter be referred to as ICT Insurance; Continental Union Insurance Company of Birmingham, Alabama, will herein-

after be referred to as Continental Union; Continental Union Life Insurance Company of Birmingham, Alabama, will hereinafter be referred to as Continental Union Life; Jack Cage and Company, a Texas Corporation of Dallas, Dallas County, Texas, will hereinafter be referred to as JACCO of Texas; Jack Cage and Company, an Alabama Corporation, will hereinafter be referred to as JACCO of Alabama; Continental Fire and Casualty Insurance Corporation of Dallas, Dallas County, Texas, will hereinafter be referred to as Continental Fire; The Republic National Bank of Dallas, Dallas County, Texas, will hereinafter be referred to as Republic Bank; The Mercantile National Bank at Dallas, Dallas County, Texas, will hereinafter be referred to as Mercantile Bank; Unitex Industries, Inc., of Ft. Worth, Tarrant County, Texas, formerly ICT Corporation, will hereinafter be referred to as ICT Corp.; the Underwriters doing business at Lloyds of London, London, England, will hereinafter be referred to as Lloyds; Compania General de Serguros La Comercial, a foreign corporation of Havana, Cuba, will hereinafter be referred to as La Comercial; Comercial and General Fire and Marine Insurance Company, a foreign corporation of Tangier, North Africa, will hereinafter be referred to as Comercial and General; Leadenhall Corporation, a Delaware Corporation, will hereinafter be referred to as Leadenhall; Guardian Insurance Company, a foreign company of Sioux Falls, South Dakota, will hereinafter be referred to as Guardian; Narragansett Insurance Company, a for-
[fol. 16] eign corporation of Providence, Rhode Island, will hereinafter be referred to as Narragansett; and The Board of Insurance Commissioners, State of Texas, and its successor, State Board of Insurance, will hereinafter be referred to as the Board.

4.

That on March 5, 1957, there were approximately 60,000 claimants and creditors who had claims against ICT Insurance in the amount of $4,134,504.56. The value of the unquestioned assets available to the Receiver with which to pay these claimants and creditors is $1,554,754.26. The

reasonable cost of administering the Estate of ICT Insurance is $750,000.00. Thus, there exists a deficit of not less than $3,329,750.30, which figure represents the losses suffered by the creditors of and claimants against ICT Insurance, as a proximate result of the wrongful acts of the defendants as hereinafter pleaded.

5.

The debts of ICT Insurance as of February 20, 1957 the date of receivership, which make up the total debts to the claimants and creditors in the sum of $4,134,504.56 are as follows:

LIABILITIES:

Accounts Payable—ICT Life Insurance Company	$ 383.72
Accounts Payable—National Bankers Life Ins. Co.	4.34
Salaries Payable	9,120.15
Labor Liens	5,455.08
Interest Payable—E. L. Lockhart	2,469.15
Accounts Payable—Paul J. Bleakley	2,709.02
Accounts Payable—ICT Employees Credit Union	101.00
Accounts Payable—Outstanding Checks	3,337.75
Union Dues Payable	275.00
State Premium Taxes	26,170.07
Notes Payable	122,670.00
ICT Stock Subscriptipn Refunds Payable—Outstanding Checks	122.52
ICT Life Stock Subscriptions Payable—Outstanding Checks	20.15
Stock Subscriptions—ICT Insurance—Credit Balances	246.91
Stock Subscriptions—ICT Life Ins. Co.—Credit Balances	42.31
Insurance Premium Refunds Payable	310.47
Payable Taxes	24,263.21
Accounts Payable	67,889.20

[fol. 17]

Note Payable—ICT Corporation	2,167.39
Interest Payable—ICT Corporation	5,273.61
Unearned Premiums	1,349,640.29
Losses Payable	2,194,015.48
Outstanding Claim Drafts	59,001.65
Adjustment Expenses Payable	191,479.78
Stock Reserved for Delivery—ICT Life Ins. Co.	63,474.50
Transfer Taxes & Fees Payable	3,851.81
TOTAL LIABILITIES	$4,134,504.56

(a) The item "Losses Payable" in the total amount of $2,194,015.48 includes the total amount of valid claims according to ICT Insurance records at date of receivership, February 20, 1957, owned and held by injured employees and families of deceased employees of employers who carried Workmen's Compensation Insurance in ICT Insurance, together with the claims of physicians, surgeons, hospitals, and other persons entitled to be compensated under the Workmen's Compensation insurance policies issued by ICT Insurance. This item also includes losses suffered by persons whose homes and business enterprises and properties were destroyed or damaged by fire; claims of persons whose automobiles were damaged or stolen; claims of persons whose property was stolen insured under burglary policy; claims of persons arising under liability policies for personal injuries suffered and property damage such parties by reason of the negligent acts of the holders of such public liability policies issued by ICT Insurance.

(b) The item "Adjustment Expenses Payable" in the total amount of $191,479.78 represents the sums owed by ICT Insurance to various persons and entities for services rendered by those persons and entities to ICT Insurance in adjusting the amount of its losses.

(c) The item "Outstanding Claim Drafts" in the total amount of $59,011.65 represents drafts issued to various claimants in payment of losses and loss adjustment expenses under insurance policies issued by ICT Insurance

but which drafts were not honored and were not paid by [fol. 18] reason of ICT Insurance being placed in receivership.

(d) The item "Unearned Premiums" in the total amount of $1,349,640.29 represents the claims of policyholders of ICT Insurance for that portion of the insured's premium which they paid in advance to ICT Insurance on their policies and which was not earned because said policies were all cancelled on March 5, 1957, by reason of ICT Insurance being placed in permanent receivership because of its insolvent condition. This unearned premium is presently due and owing to such policyholders by the Receivership Estate of ICT Insurance.

(e) The item "Accounts Payable" includes many and various accounts due and owing by ICT Insurance as of the date of receivership to approximately 114 persons or firms in the amount of $67,889.29 for unpaid bills for printing, stationery, supplies and other operating expenses.

(f) The item "Salaries Payable" in the amount of $9,120.15 represents the salaries of employees of ICT Insurance which had been earned but which had not been paid as of the date of receivership.

(g) The item "State Premium Taxes" in the amount of $26,170.07 represents premium taxes on direct written premiums from January 1, 1956 to February 20, 1957, payable by ICT Insurance to the insurance departments of Alabama, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, New Mexico, South Carolina, Tennessee, and Texas, in which states ICT Insurance was or had been doing business.

(h) The item "Payroll Taxes" in the amount of $24,263.21 represents payroll taxes due the Director of Internal Revenue and the Texas Employment Commission by ICT Insurance for the payroll period ending February 15, 1957, for income, withholding, social security and payroll taxes.

(i) The item "Accounts Payable—ICT Life Insurance Company" in the amount of $383.72 represents balance [fol. 19] due ICT Life on inter-company expense transac-

tions for the period November 1, 1956, through February 19, 1957.

(j) The item "Accounts Payable—National Bankers Life Insurance Company" in the amount of $4.34 represents premiums withheld from Kenneth S. Tweedt from salary for period February 20, 1957 through February 28, 1957.

(k) The item "Labor Liens" in the amount of $5,455.08 represents salaries due and owing by ICT Insurance to various employees of ICT Insurance for salaries and travel expenses for the dates February 16, 1957 through February 19, 1957, the date of receivership.

(l) The item "Interest Payable—E. L. Lockhart" in the amount of $2,469.15 represents interest accrued on First and Second Mortgage Loans from December 1, 1956 to February 19, 1957 to E. L. Lockhart, the holder of said Mortgage.

(m) The item "Accounts Payable—Paul J. Bleakley" in the amount of $2,709.02 represents the interest on St. Michael's College Foundation, Inc., Debenture Bonds due Paul J. Bleakley.

(n) The item "Accounts Payable—ICT Employees Credit Union" in the amount of $101.00 represents funds withheld from payroll checks for benefit of accounts of employee members of ICT Employees' Credit Union during pay period February 1, 1957 to February 15, 1957.

(o) The item "Accounts Payable—Outstanding Checks" in the amount of $3,337.75 represents checks issued by ICT Insurance to various creditors for services rendered but which checks were not honored or permitted to be paid by reason of ICT Insurance being placed in receivership.

(p) The item "Union Dues Payable" in the amount of $275.00 represents union dues withheld from ICT Insurance employee members of "Office Employees International [fol. 20] Union" for pay period January 1, 1957 to February 15, 1957, which amount of union dues withheld from employees' salary is now due and owing by ICT Insurance to such union.

(q) The item "Notes Payable" in the amount of $122,670.00 represents a promissory note dated January 4, 1957 payable on demand to ICT Life Insurance Company, which said note was secured by ICT Insurance.

(r) The item "ICT Stock Subscription Refunds Payable —Outstanding Checks" in the amount of $122.52 represents checks issued by ICT Insurance as refunds to stock subscribers of ICT Insurance, which checks were not paid by reason of ICT Insurance being placed in receivership.

(s) The item "ICT Life Stock Subscriptions Payable—Outstanding Checks" in the amount of $20.15 represents checks issued to subscribers of ICT Life stock as refunds, but which checks were not paid by reason of ICT Insurance being placed in receivership.

(t) The item "Stock Subscriptions—ICT Insurance—Credit Balances" in the amount of $246.91 represents balance due subscribers of ICT Insurance Stock due to overpayment of said subscriptions.

(u) The item "Stock Subscriptions—ICT Life Insurance Company—Credit Balances" in the amount of $42.31 represents overpayment on ICT Life subscriptions which stock of ICT Life, ICT Insurance was selling on a subscription basis.

(v) The item "Insurance Premium Refunds Payable" in the amount of $310.47 represents insurance premiums withheld from employees' salaries for January and February 1957 for insurance coverage under a group insurance policy.

(w) The item "Notes Payable—ICT Corporation" in the amount of $2,167.39 represents the unpaid balance on a [fol. 21] note in the original amount of $252,167.39 executed by ICT Insurance to ICT Corporation.

(x) The item "Interest Payable—ICT Corporation" in the amount of $5,273.61 represents 5 per cent interest from August 30, 1956 to December 31, 1956 on a note payable by ICT Insurance to ICT Corporation in the principal amount of $252,167.39.

(y) The item "Stock Reserved for Delivery—ICT Life Insurance Company" in the amount of $63,474.50 represents stock of the ICT Life Insurance Company in the amount of $63,474.50 which ICT Insurance is obligated to deliver upon final payment of the subscriptions to such stock by the subscribers.

(z) The item "Transfer Taxes and Fees Payable" in the amount of $3,851.81 represents amounts due Internal Revenue Service and the State of Texas for tax stamps to be purchased and affixed to stock book stubs surrounding the issuance of stock of ICT Insurance.

Your Receiver would show that the financial picture of the receivership estate of ICT Insurance is constantly changing from day to day inasmuch as accounts receivable are being reduced to cash, the claims of creditors are being fixed, and classification is allowed and disallowed. Proof of the exact amount of the deficit will be made at the time of trial, and if necessary, Amended Pleading will be filed setting forth any material change in such financial picture.

6.

That as of the date of receivership, 1,515,042 shares of stock of ICT Insurance had been sold to 14,980 purchasers or stockholders, which said purchasers paid a total of $9,531,176.23 for such stock; that the sale of such stock under the conditions at which it was sold constituted wrongs as against ICT Insurance and its stockholders as will hereinafter be more fully pleaded, damaging ICT Insurance [fol. 22] and its stockholders in the total amount of $9,531,176.23.

That such damage to ICT Insurance and its stockholders in such amount of $9,531,176.23 was a proximate result of the wrongful acts of the defendants and for which amount of damages the Receiver herein sues in his representative capacity on behalf of ICT Insurance and such stockholders.

7.

That as of the date of receivership, 155 subscribers had subscribed for stock of ICT Insurance in the total amount

of $54,576.71; that such subscribers paid in a total amount of $45,279.25 and owed a balance of $9,297.46. Such subscribers are liable for the balance due on such subscriptions in the amount of $9,297.46 and therefore, upon the collection of said balance due on such subscriptions, said subscribers will have paid in the total amount of such subscriptions in the amount of $54,576.71; that conditions under which such stock was sold under such stock subscriptions constituted wrongs as against ICT Insurance and the subscribers to such stock as will hereinafter be more fully shown and damaged ICT Insurance and such subscribers in the total amount of $54,576.71; that such damage to ICT Insurance and its stock subscribers in the amount of $54,576.71 was a proximate result of the wrongful acts of the defendants as hereinafter pleaded, and for which amount of damages the Receiver herein sues in his representative capacity to recover on behalf of ICT Insurance and such stock subscribers.

8.

The Receiver brings this Cause of Action on behalf of and as a representative of ICT Insurance Company and its claimants, creditors, policyholders, stockholders and subscribers to capital stock and as a representative of the public interest for the losses suffered and obligations in- [fol. 23] curred by ICT Insurance and its claimants, creditors, policyholders and stockholders in the total amount of $15,000,000.00, which said losses incurred were directly and proximately caused by the wrongful, fraudulent, negligent and illegal conduct of the defendants committed against ICT Insurance in connection with the organization of ICT Insurance in May 1950 and the operation of ICT Insurance up to the date of receivership. As will be set forth in detail hereinafter in this Petition, such wrongful acts include the following:

(a) A conspiracy to defraud ICT Insurance Company and all parties represented herein by the Receiver, and the public which began in May 1950 and continued until February 20, 1957, the date of receivership, which said conspiracy was conceived by, and or executed by, and/or

agreed to, and/or embraced by, and/or assisted, promoted, and furthered by the particular defendants as hereinafter shown. That the civil wrongs committed upon which the conspiracy to defraud action is based, as hereinafter more fully pleaded, consist of fraudulent, illegal and wrongful acts entered into by the Officers and Directors in violation of their fiduciary duty to ICT Insurance and third parties who joined and aided such Officers and Directors to create and simulate fictitious assets and to aid, camouflage, and cover up liabilities so that based upon such fraudulent and illegal transactions such parties could, did make and aided and abetted in the making of false representations that ICT Insurance had the required capital in ICT Insurance Company's original charter application, annual statements, examination reports, charter amendments, the various certificates, reports and affidavits pertaining to the assets and liabilities of ICT Insurance made to governmental agencies and to the public in order to aid ICT Insurance to commence business in violation of the insurance laws and to continue to operate in violation of such laws, al- [fol. 24] though ICT Insurance was hopelessly insolvent; that by reason of such fraudulent acts all such Officers and Directors and third parties in creating such false assets and in hiding liabilities and losses and the false and misleading character of the original charter application, amended charter applications, annual statements, and other reports and publications as to ICT Insurance Company's financial condition, the claimants, creditors, policyholders and stockholders and the Attorney General of the State of Texas were not informed of ICT Insurance Company's actual condition and did not have the opportunity to take steps to repair or require the repair of such losses or to put ICT Insurance into liquidation, by reason of which, ICT Insurance was permitted to continue to operate in violation of law and to incur further losses, liabilities, and obligations that it could not pay; that by virtue of such wrongful, illegal and fraudulent acts, ICT Insurance was permitted to continue to operate in violation of law and incur additional losses and liabilities and obligations it could not meet or fulfill and was damaged in the amount of $15,000,000.00; that such illegal, dishonest, wrongful and fraudu-

lent acts were a proximate cause of such damage and losses directly to ICT Insurance and indirectly to its claimants, creditors, policyholders, stockholders and stock subscribers.

(b) That by reason of, as hereinafter alleged, the misapplication of corporate funds, negligence, gross neglect and inattention to their official duties, mismanagement, maladministration, breaches of trust, malfeasance, misfeasance, nonfeasance, waste and dissipation of monies and properties committed to their care in a fiduciary relationship tantamount to trusteeship, transgressions, delinquencies, circumventions of the laws, dishonest and flagrant systematic disregard over a long period of time of their duties, the Officers and Directors and third parties who joined in, aided, participated and assisted in such breaches of duty against ICT Insurance are liable to the Receiver in his representative capacity for all losses suffered by and damages to ICT Insurance and its claimants, creditors, [fol. 25] policyholders, stockholders and stock subscribers in the total amount of $15,000,000.00, which said losses and damages were a direct and proximate result of such wrongful acts.

(c) Wrongful abstractions, embezzlements, conversion and misappropriation of money held in trust, perjury, false swearing misrepresentations and similar dishonest and fraudulent acts committed alone by certain officers or employees of ICT Insurance or in collusion with others constituted dishonest or fraudulent acts for which such defendants and their bondsmen, the Fidelity and Deposit Company of Maryland are jointly and severally liable, such wrongful acts and the persons who aided and joined in the commission thereof are set forth in detail hereinafter in this Petition.

(d) For the making of and/or aiding of, and/or permitting false examination reports to be made, and/or for accepting false annual statements and examination statements and reports of the affairs of ICT Insurance, J. Byron Saunders, as a member and Chairman of the Board of Insurance Commissioners of the State of Texas, and Garland A. Smith, as a member and Chairman of the Board of Insurance Commissioners, and their bondsmen, National

Surety Corporation, New York, and American General Insurance Company, Houston, Texas, are jointly and severally liable.

(c) As an alternative pleading, the Receiver, on behalf of and as representative of the stockholders and stock subscribers to the capital stock of ICT Insurance and as a representative of the public interest, seeks to recover the losses suffered by such stockholders and stock subscribers, which losses were a proximate result of the wrongs committed by the defendants as hereinafter alleged, based on the sale of and a conspiracy to sell worthless securities to such persons by use of the United States mails in violation of the Federal Securities Act of 1933 (Title 15 USC Sec. 77-L(2)).

[fol. 26]

9.

In May 1950, Ben Jack Cage, Wm. Ross Kennedy, Garth W. Daniel, A. B. Dupuy, Jack V. Cage, L. W. Kellogg, J. K. Leaman and O. Z. Gulledge were associated together as underwriters under the Lloyd's Plan of Insurance and were doing an insurance business through an attorney-in-fact at Texas Lloyds, Dallas, Texas. These defendants, along with John G. Vaughan, wanted to organize and operate a capital stock insurance company with a multiple line fire and general casualty business, which, under the insurance laws required original capital in the amount of $200.000.00. They determined to organize and operate such a capital stock company without complying with the insurance laws of Texas. It was not their intent to organize such company in good faith with the required $200,000.00 in cash or admissible assets equal to such value as required by the insurance laws, but they intended to simulate the capital requirement of $200,000.00 necessary for the original capital of such company and obtain by fraud and concealment, the original charter and license to do business in Texas. It was their further purpose and intent after obtaining such original charter and license to do business to operate such company with such fictitious and simulated capital and to sell policies of insurance to an unsuspecting public who would not be aware of the inability of such com-

pany to pay its losses and to sell stock of such company to an unsuspecting public who would not be aware that such stock was worthless. It was their intent to set afoot a corporate creature conceived in fraud and born in inequity and permit it to incur liabilities and obligations it could not meet, all in violation of the laws surrounding its creating and to continue to permit such corporate entity to operate in violation of the insurance laws by filing false annual statements and reports and by bribing public officials whose sworn duties to the public were to see that the [fol. 27] laws were complied with, all in order that the defendants could continue to prey upon the unsuspecting public in selling worthless insurance policies and stock and thereby incur liabilities and obligations that could not be met by such company. It was a part of such plan and conspiracy to give to Ben Jack Cage, Jack V. Cage and John G. Vaughan and later, Nile E. Ball, a management contract, in order that such individuals could receive a percentage of the premiums paid in by the policyholders on all policies written as a commission, and a percentage of the proceeds from all of the capital stock sold as a commission, which commissions paid to such defendants totaled approximately $10,000,000.00. They did not care whether the company had sufficient capital and surplus as required by law to commence business and to continue to do business, or whether the company had sufficient money to pay its policyholders and creditors, or whether the company had sufficient money to pay dividends to the stockholders or to return the investment of the stockholders in the event that such stockholders demanded a return of their investments, or in the event of dissolution. They wanted merely to organize and keep the company operating in order that they could sell and continue to sell worthless insurance policies and stock so that they could receive such commissions. They wanted merely to realize for themselves and for whomsoever would join them, a profit in such venture, all in utter disregard to the rights of the company and its claimants, creditors, policyholders, stockholders and stock subscribers. In such scheme, venture and conspiracy, they were joined by many who for their own personal gain joined in, aided, abetted, devised and schemed to help effectuate and carry out the fraudulent

scheme and conspiracy by which their purpose was accomplished, all as here and now will be pleaded.

10.

As a part of the plan of organizing a capital stock in- [fol. 28] surance company to be known as The Insurance Company of Texas (which name was later changed to ICT Insurance Company), all of the assets of Texas Lloyds were to be conveyed to the new company and the new company was to reinsure all of the outstanding policies of Texas Lloyds and assume all of its outstanding obligations. As of May 1950, Texas Lloyds had a purported surplus of $342,177.51. However, the defendants knew and it will be hereinafter shown, that a majority of the assets that were carried by Texas Lloyds and which enabled such defendants to show a surplus in the above amount in Texas Lloyds, were either not admissible assets that could be carried in an insurance company and/or were not worth their purported value, and when in truth and in fact, the defendants knew that such assets were not good assets and that in fact, Texas Lloyds was hopelessly insolvent. Therefore, such defendants knew that they could not use such assets in the original incorporation of ICT Insurance. The defendants knew that if such assets were used for the purpose of incorporating ICT Insurance and to show that it had the required capital in the amount of $200,000.00 that such assets would not be admissible assets and an examination which is required upon incorporation would reveal, if properly made, that such assets were worthless and that ICT Insurance would not have the required capital of $200,000.00 in order to entitle them to do business. Therefore, in order to effectuate the original incorporation of ICT Insurance and to obtain its original certificate of authority, a plan was advised and carried out whereby a temporary loan in the amount of $200,000.00 was obtained from the Mercantile Bank, the proceeds of which loan were used in order to obtain the original Charter and the original Certificate of Authority, after which, the said $200,000.00 was immediately repaid to the Mercantile Bank. Such transaction was effected in the follow-

ing manner: On April 26, 1950, an agreement was entered into by and between the Mercantile Bank and Ben Jack [fol. 29] Cage, Jack V. Cage and John G. Vaughan, wherein it was agreed that the Mercantile Bank would loan to Ben Jack Cage and Jack V. Cage the sum of $200,000.00, with the understanding that the proceeds of such loan would be used for the purpose of organizing a new insurance company under the laws of the State of Texas. It was the further understanding between Ben Jack Cage and the Mercantile Bank that after the incorporation of the new company was effected, such company would purchase all of the assets of Texas Lloyds in consideration for the assumption by the new company of all of Texas Lloyds' liabilities, including reinsurance of all its policies in force, for the cash payment by the new corporation to Ben Jack Cage as underwriter of Texas Lloyds of the sum of $200,000.00. It was further understood and agreed between Ben Jack Cage and the Mercantile Bank that such purchase was to be effected before any other transaction would be had by the new insurance company and that the proceeds from such purchase would be used by Ben Jack Cage and Jack V. Cage to repay their $200,000.00 note to the Mercantile Bank. It was further understood and agreed that if the Board of Insurance Commissioners failed to approve the sale of the assets and the assumption of the liabilities of Texas Lloyds, or for any other reason the sale was not effected, then Ben Jack Cage would cause the new insurance company to be immediately dissolved and the $200,000.00 would be used to repay his obligation to the Mercantile Bank. The proceeds of such loan in the amount of $200,000.00 was on the 24th day of May 1950 deposited directly to the account of ICT Insurance.

11.

On the 24th day of May 1950, the original Charter Application of ICT Insurance, together with supporting affidavits, and a duplicate deposit slip showing a deposit of $200,000.00 to the account of ICT Insurance, signed by Meyer J. Rachofsky, Vice-President of Mercantile Bank, were submitted to the Attorney General and the Board of

[fol. 30] Insurance Commissioners of Texas for approval. On the 22nd day of May 1950, Jack V. Cage, Ben Jack Cage and John G. Vaughan swore to the following affidavit which was submitted with the original charter application of ICT Insurance to the Attorney General and the Board:

"THE STATE OF TEXAS
COUNTY OF DALLAS

AFFIDAVIT TO ACCOMPANY ORIGINAL CHARTER OF THE INSURANCE COMPANY OF TEXAS

Before me, the undersigned authority, on this day personally appeared Jack V. Cage, Ben Jack Cage, and John G. Vaughan, known to me to be the persons whose names are subscribed below, who, having first been duly sworn by me, on oath deposed and said, each for himself;

That they are the identical parties who executed the charter of THE INSURANCE COMPANY OF TEXAS, which is sought to be incorporated under the laws of the State of Texas; that the full amount of the capital stock with par value, to be issued by said company, namely $200,000.00 has been in good faith subscribed and $200,000.00 thereof, which is 100% thereof, has been paid for in cash, and the said sum of $200,000.00 has been deposited in the Mercantile National Bank at Dallas, Dallas County, Texas, to the account of the corporation and a duplicate deposit slip and a certificate from the said Bank are attached hereto as supporting evidence of the above statements; that the following are the names, residences and post office addresses of the parties subscribing to the said capital stock:

Names	*Residences*	*Post Office Addresses*
Jack V. Cage		Sugarland, Texas
Ben Jack Cage	Warwick Hotel	Houston, Texas
John G. Vaughan	8610 Beauregard	Dallas, Texas

That the amount subscribed by each and the amount paid by each (such payment being in cash,) are as follows:

Names	*Amount Subscribed*	*Amount Paid For*
Jack V. Cage	10.00	10.00
Ben Jack Cage	199,980.00	199,980.00
John G. Vaughan	10.00	10.00

/s/ Jack V. Cage
/s/ Ben Jack Cage
/s/ John G. Vaughan

Subscribed and sworn to before me, by the said Jack V. [fol. 31] Cage, Ben Jack Cage, and John G. Vaughan, respectively, this 22nd day of May, 1950, to certify which witness my hand and seal of office.

/s/ Stanley E. Prichard
Notary Public in and for
Dallas County, Texas."

On the 22nd day of May 1950, Jack V. Cage, Ben Jack Cage and John G. Vaughan likewise swore to the following affidavit which was also submitted with the original charter application of ICT Insurance to the Attorney General and the Board:

"THE STATE OF TEXAS)
COUNTY OF DALLAS)

Before me, the undersigned authority, on this day personally appeared Jack V. Cage, Ben Jack Cage and John G. Vaughan, all known to me, who after being duly sworn, upon oath, each for himself deposes and says:

That they are the identical parties who executed the Charter of The Insurance Company of Texas; that the full amount of the capital stock, to-wit, Two Hundred Thousand Dollars ($200,000.00), has been in good faith subscribed and paid in cash; that such sum of $200,000.00 paid in is now on deposit in the Mercantile National Bank at Dallas, Texas, and is the bonifide property of The Insurance Company of Texas.

/s/ Jack V. Cage
/s/ Ben Jack Cage
/s/ John G. Vaughan

Subscribed and sworn to before me, this the May 22 day of May 1950.

/s/ Stanley E. Prichard
Notary Public in and for Dallas, Dallas County, Texas."

12.

On the 23rd day of May 1950, Meyer J. Rachofsky, Vice-President of the Mercantile Bank, swore to the following affidavit, which was likewise submitted with the original charter application of ICT Insurance to the Attorney General and the Board:

[fol. 32] "THE STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Meyer J. Rachofsky, Vice President of the Mercantile National Bank at Dallas, Texas. Who, after being duly sworn, on his oath, deposes and says:

That he is the Vice President of the Mercantile National Bank of Dallas, Texas, and he knows of his knowledge that The Insurance Company of Texas, a proposed Corporation of Dallas, Texas, has on deposit in said Bank the sum of Two Hundred Thousand ($200,000.00) Dollars, and that said funds are subject to the check of said Company and wholly and entirely at the disposal of The Insurance Company of Texas, insofar as said Bank is concerned; that no other person, firm, Corporation or Association has any interest in or claim to said funds; and the said, The Insurance Company of Texas, is not indebted to said Bank in any amount whatever, and that there are no offsets or counterclaims against said money or any part thereof.

/s/ Meyer J. Rachofsky

Sworn and subscribed to before me, by the said Meyer J. Rachofsky, Vice President this the 23 day of May, 1950.

/s/ G. P. Woodcock, Notary Public in and for Dallas, Dallas County, Texas."

13.

At the time Jack V. Cage, Ben Jack Cage and John G. Vaughan executed the two above affidavits on the 22nd day of May 1950, they well knew that such affidavits were false. At the time the $200,000.00 was deposited in the Mercantile Bank and at the time they made such false and fraudulent affidavits, they did not intend that such money should be the bona fide funds of ICT Insurance. To the contrary, they knew that the $200,000.00 was borrowed funds and that the said $200,000.00 was to remain on deposit with the Mercantile Bank under the agreement with the Mercantile Bank, and that after the incorporation of ICT Insurance, such $200,000.00 would be used to repay the obligation of Ben Jack Cage and Jack V. Cage to the Mercantile Bank; that under such agreement, they knew that the full amount of capital stock of $200,000.00 had [fol. 33] not been in good faith subscribed and paid in cash and that the $200,000.00 was encumbered in that it was to be withdrawn from the account of ICT Insurance after its incorporation and repaid to the Mercantile Bank under the agreement with the Mercantile Bank as hereinabove alleged. They further knew, contrary to their sworn affidavits, that the full amount of capital stock of $200,000.00 had not been subscribed and fully paid in.

14.

At the time that Meyer J. Rachofsky, Vice-President of the Mercantile Bank, made the affidavit hereinabove set forth, he knew that such affidavit was false. He knew, contrary to his sworn affidavit, that ICT Insurance did not have the sum of $200,000.00 on deposit in the Mercantile Bank subject to the check of the company and wholly and entirely at the disposal of ICT Insurance, and contrary to his affidavit, he knew that other persons, firms, corporations or associations, had an interest in such funds, and he knew that there were offsets or counter-claims against such funds. He knew at the time that he made such affidavit that under the terms of the agreement under which said loan was made, that the $200,000.00 was a temporary loan in order to aid the incorporation of ICT Insurance,

and that the $200,000.00 would remain on deposit in such Bank as security for such loan, and would be used by Jack V. Cage and Ben Jack Cage to repay their loan at the Mercantile Bank. He knew that under such agreement the $200,000.00 could not be used by ICT Insurance for any other purpose other than to repay such $200,000.00 loan of Ben Jack Cage and Jack V. Cage obtained from the Mercantile Bank.

15.

The above affidavits, together with a duplicate deposit slip executed by the Mercantile Bank showing a deposit of $200,000.00 to the account of ICT Insurance, signed by Meyer J. Rachofsky, Vice-President of the Mercantile [fol. 34] Bank, together with the Application of the Original Charter for ICT Insurance, were presented to the Board of Insurance Commissioners and to the Attorney General of the State of Texas on May 24, 1950. The Attorney General of the State of Texas relied upon the statements contained in such sworn affidavits of Ben Jack Cage, Jack V. Cage, John G. Vaughan, and Meyer J. Rachofsky, and the signed deposit slip of the Mercantile National Bank signed by Meyer J. Rachofsky, showing the deposit of the $200,000.00 in the account of ICT Insurance in approving the original Articles of Incorporation of ICT Insurance. Likewise, the Board of Insurance Commissioners relied upon such affidavits and deposit slip on May 24, 1950 in entering an order on said date granting to ICT Insurance a Certificate of Authority to engage in the insurance business for the year ending May 31, 1951. On the same date, the Board of Insurance Commissioners issued Certificate #402 to ICT Insurance to commence doing a general fire and casualty business. On the same date, George B. Butler issued Certificate #2033 certifying that ICT Insurance had according to sworn statement complied with the laws of Texas as conditions precedent to its doing business in the State of Texas. Such Certificate of Compliance under the laws was required to be published in the newspaper for the benefit of the public, and such Certificate made by George B. Butler as above set forth was published in The Dallas Morning News on May 29, 1950,

June 5, 1950, and June 12, 1950. Such certification was likewise published in the McKinney Courier-Gazette on May 31, 1950, June 7, 1950, and June 14, 1950. Certificates of Publication were likewise executed by George B. Butler, certifying that such Certificate of Authority was published in such newspapers on such dates. The above action taken by the Board of Insurance Commissioners and the Attorney General and the Certificates issued pursuant thereto, were all issued by the Board in reliance upon the false [fol. 35] affidavits of Ben Jack Cage, Jack V. Cage, John G. Vaughan, and Meyer J. Rachofsky to the effect that ICT Insurance Company's original capital of $200,000.00 had been fully subscribed and paid in and that ICT Insurance had the required $200,000.00 in capital in the form of cash assets on deposit in the Mercantile Bank, free of unencumbered.

16.

Immediately after the obtaining of the Original Articles of Incorporation from the Attorney General and the Board of Insurance Commissioners, and the obtaining of the Certificate of Authority to commence business on June 5, 1950, ICT Insurance issued its check in the amount of $200,000.00 to Ben Jack Cage, which check Ben Jack Cage endorsed to the Mercantile Bank in repayment of the $200,000.00 loan from the Mercantile Bank to Ben Jack Cage and Jack V. Cage. Thus, fourteen days after the Attorney General had approved the Original Articles of Incorporation and the Board had issued a Certificate of Authority to commence doing business, the entire amount of capital of ICT Insurance of $200,000.00 was withdrawn and paid to the Mercantile Bank in payment of the personal note of Ben Jack Cage and Jack V. Cage. ICT Insurance had been established through the use of fraud and deceit and stood ready to prey upon the unsuspecting public in the sale of its insurance policies and stock without the required capital to back up any liabilities incurred to members of the public who might be deceived into believing that the laws surrounding its incorporation had been complied with and that it had the necessary capital to begin doing an insur-

ance business with which to pay any debts and liabilities that ICT Insurance incurred.

17.

Ben Jack Cage, Jack V. Cage, John G. Vaughan, Mercantile Bank, Wm. Ross Kennedy, Garth W. Daniel, A. B. Dupuy, L. W. Kellogg, J. K. Leaman and O. Z. Gulledge, [fol. 36] knew and are charged with knowledge that the Texas Insurance Code required that before ICT Insurance could obtain its original Articles of Incorporation and before it was authorized to be issued a Certificate of Authority to commence to do business as a casualty and fire insurance company, that ICT Insurance had to have and maintain a capital of $200,000.00. Each of such persons knew and is charged with knowledge that the sum of $200,000.00 cash or invested assets was required to be maintained by such company at all times in order to issue insurance policies or to transact any business. Each such person knew and is charged with knowledge that Article 4682, RCS, now Article 1.10, Sec. 5, of the Texas Insurance Code, provided that in the event that the Board shall, in case it finds the capital stock of the company impaired to the extent of 20 per cent, give notice to the company to make good its whole capital stock within sixty days, and that if this is not done, that the Board shall require the company to cease to do business and institute immediate legal proceedings. Therefore, when the above affidavits were made to the Attorney General and to the Board that ICT Insurance had the necessary capital of $200,000.00, these defendants knew that such representations were false and that ICT Insurance did not have the required $200,000.00 to commence doing business or to continue to do business and were charged with the specific duty of reporting the true financial condition of such company to the Board. They were charged with the duty of revealing to each and every policyholder, creditor and prospective policyholder and creditor of the true condition of the company. Likewise, such responsibility rested upon every officer and director of ICT Insurance to make a full disclosure of ICT Insurance Company's financial con-

dition but to the contrary, through fraud and deceit, such persons enabled ICT Insurance to obtain its original Char- [fol. 37] ter and Certificate of Authority to commence doing business in violation of law and actively assisted and promoted ICT Insurance in commencing to do an insurance business from the time of its inception until such time such company was placed in receivership. Through such fraudulent acts, these defendants joined in, aided, and abetted the first step in the conspiracy to defraud in the organization of ICT Insurance in violation of law and in the continuation of its operation in violation of law. The violation of these defendants' duty and responsibility under the law, and the other defendants who joined and aided them as hereinafter shown continuously from the date of May 24, 1950, until February 20, 1957, was a fraud upon ICT Insurance and all its creditors, policyholders, claimants, stockholders and stock subscribers of ICT Insurance during such period and was a direct and proximate cause of the eventual loss and damage to ICT Insurance and to its claimants, creditors, policyholders, stockholders and stock subscribers in the total amount of $15,000,000.00.

18.

In the alternative, the Receiver alleges that by reason of the representations of the Mercantile Bank that the $200,000.00 was the free and unencumbered property of ICT Insurance, that the Mercantile Bank is estopped from asserting otherwise and that when the $200,000.00 was withdrawn from the account of ICT Insurance and repaid to the Mercantile Bank on the personal loan of Ben Jack Cage and Jack V. Cage, such act constituted a conversion and misappropriation of the assets of ICT Insurance by the Mercantile Bank to the benefit of the Mercantile Bank, which $200,000.00 the Receiver herein sues to recover.

19.

By the terms of a Reinsurance Agreement, effective May 31, 1950, between Texas Lloyds and ICT Insurance, the [fol. 38] defendants, Ben Jack Cage, Jack V. Cage and John G. Vaughan sought to transfer to ICT Insurance all.

of the assets of Texas Lloyds with an agreement that ICT Insurance would assume all outstanding policies and liabilities of Texas Lloyds and an attempt through such means to replace the original capital in the amount of $200,000.00 that was repaid to the Mercantile Bank in payment of the personal loan of Ben Jack Cage and Jack V. Cage, as hereinabove shown. At the time of such transaction, these defendants knew that certain of the assets were either not admissible assets that could be carried by an insurance company or that such assets were worthless. They knew that in truth and in fact, by such assets being non-admissible and/or worthless, that under such transactions, ICT Insurance took over liabilities far in excess of admissible or good assets it received in such transaction, which left ICT Insurance without the required capital and an additional deficit. Among the assets transferred from Texas Lloyds to ICT Insurance to make up the purported capital and surplus of $342,177.51 were the following:

(a) A $100,000.00 note secured by a Deed of Trust on certain property in Travis County, Texas, executed by Garth W. Daniel and Equitable Realty Corporation by Garth W. Daniel, President;

(b) an $85,000.00 note secured by a Deed of Trust on certain property in Ft. Bend County, Texas, executed by North American Development Company;

(c) $100,000.00 worth of Debenture Bonds issued by North American Development Company;

(d) $100,000 worth of Debenture Bonds issued by Coastal Development Company, and

(e) $50,000.00 in stock of the Bankers Discount Corporation.

[fol. 39] -20-

As to the $100,000.00 Mortgage Note executed by Garth W. Daniel and Equitable Realty Corporation, such Mortgage Note was not an admissible asset that could be carried by an insurance Company for the following reasons: Art.

47606, RCS, now Art. 2.10 of the Insurance Code, required that in order to carry a First Mortgage Note as an admissible asset in an insurance company, the property must be worth 40 per cent more than the amount loaned thereon. The Mortgage securing the $100,000.00 Note was executed on two lots in Austin, Travis County, Texas. In October 1949, when Garth W. Daniel and Equitable Realty Corporation executed the $100,000.00 Note secured by a Deed of Trust on such lots, Garth W. Daniel had outstanding loans on each of said lots. One of such loans was with the Mutual Savings Institution at Austin, Texas, with a balance due thereon in the amount of $10,588.85 and the other loan on the other lot was with the Austin Savings and Loan Association, Austin, Texas, with an outstanding balance of $12,531.46; that as a consideration for Garth W. Daniel and Equitable Realty Corporation executing the $100,000.00 Note secured by a Deed of Trust on such lots, Texas Lloyds paid off such loans to said institutions and in addition paid to Garth W. Daniel and Equitable Realty Corporation $1,879.69, making a total loan by Texas Lloyds on such property in the amount of $25,000.00. For the remaining $75,000.00, Garth W. Daniel was given an underwriting interest in such amount in Texas Lloyds. At the time that the $100,000.00 Note secured by the Deed of Trust on such property was executed and accepted by Texas Lloyds, Garth W. Daniel and the Officers and Underwriters of Texas Lloyds knew that such property was not worth 40 per cent more than the $100,000.00 supposedly loaned thereon and that at the outside, the property was not worth more than [fol. 40] $40,000.00; that the giving of Garth W. Daniel an underwriting interest in the amount of $75,000.00 being the difference that Texas Lloyds actually loaned on said property of $25,000.00 and the $100,000.00 Mortgage that was taken was a subterfuge in order to attempt to justify the carrying of such Mortgage as an asset in the amount of $100,000.00 as will hereinafter be more fully shown.

21.

As to the $85,000.00 First Mortgage Note executed by the North American Development Company, such Mortgage

Note was not an admissible asset that could be carried in an insurance company for the following reason: Such property was not worth 40 per cent more than such mortgage note as required by Art. 2.10 of the Insurance Code, and further, such property was a homestead and therefore encumbered.

22.

As to the $100,000.00 North American Development Company Debenture Bonds, such bonds were not an admissible asset that could be carried by an insurance company for the following reasons: Under Art. 4706, RCS, (now Art. 2.10 of the Insurance Code), an insurance company can only invest in the debenture bonds of a corporation that is five years old, that has paid a dividend for the past five years preceding such investment, and had not defaulted in any of its obligations for such period of five years. North American Development Company was not a corporation that had been in existence for a period of five years; furthermore, North American Development Company never paid a dividend and such corporation never at any time had sufficient assets to back up the liability incurred in the issuance of the $100,000.00 worth of Debenture Bonds. The North American Development Company was merely the [fol. 41] alter ego of Ben Jack Cage, which corporation Ben Jack Cage used merely for the purpose of issuing such worthless $100,000.00 Debenture Bonds and to further use such corporation merely for the additional purpose of hiding the extravagant salaries paid to certain officers of ICT Insurance. At the time that the $100,000.00 Debenture Bonds of North American Development Company were transferred to ICT Insurance, Ben Jack Cage, Jack V. Cage, John G. Vaughan, and the other Officers and Directors knew that such Bonds were not admissible assets that could be carried by an insurance company and they knew that such Bonds were non-admissible assets or worthless and did not constitute property of value with which to pay the claims of policyholders and debts owing to creditors.

23.

As to the $100,000.00 Debenture Bonds of Coastal Development Company, such Bonds were not an admissible asset that could be carried by an insurance company for the following reasons: Coastal Development Company was organized on May 27, 1947; therefore, such company had not been in existence for a period of five years, had not paid dividends for a period of five years and therefore its Debenture Bonds in the amount of $100,000.00 did not qualify as an admissible asset under Art. 4706, RCS, (now Art. 2.10 of the Insurance Code). Furthermore, such provision of the Code provides that the funds of an insurance company could not be invested in a mercantile corporation unless such corporation has a combined capital, surplus and undivided profits of not less than two and one-half million dollars; that in May 1950 when the $100,000.00 of Debenture Bonds of Coastal Development Company were transferred to ICT Insurance, the combined capital, surplus and undivided profits of Coastal Development Com- [fol. 42] pany was $21,398.41, as per audit made by J. A. Phillips, Sheffield and Company, Certified Public Accountants in Houston, Texas. Therefore, the Coastal Development Company not having anywhere near the two and one-half million dollars capital, surplus and undivided profits, its Debenture Bonds were not admissible as assets of ICT Insurance under such provision of the Insurance Code. Furthermore, the Coastal Development Company did not have sufficient assets to back up the liability created by the issuance of the $100,000.00 Debenture Bonds and was not in a position to pay such indebtedness in the event ICT Insurance needed to liquidate such bonds for the purpose of payings its claims or debts owing to its creditors. At the time that the $100,000.00 Debenture Bonds of Coastal Development Company were transferred to ICT Insurance and carried in such company as an asset, defendants Ben Jack Cage, Jack V. Cage, John G. Vaughan and the other Officers and Directors knew that these Debenture Bonds were not an admissible asset under the Insurance Code, and knew that the $100,000.00 worth of Debenture Bonds were non-admissible assets or worthless, and knew that such

Bonds or the liquidation of same could not be used to pay claims of policyholders and debts to creditors.

24.

As to the $50,000.00 worth of stock of Bankers Discount Corporation, such stock was not an admissible asset that could be carried in an insurance company under the insurance laws for the reason that such corporation was organized in 1948 and therefore not being a corporation in existence for a period of five years, such stock was not an admissible asset in ICT Insurance under the provisions of Art. 4706 RCS (now Art. 2.10 of the Insurance Code). At the time that the $50,000.00 worth of Bankers Discount Corporation stock was transferred to ICT Insurance and [fol. 43] carried in such company as an asset. Ben Jack Cage, Jack V. Cage, John G. Vaughan and the other Officers and Directors knew that such was not an admissible asset that could be carried by ICT Insurance.

25.

At the time these defendants entered into the Assumption and Reinsurance Agreement between ICT Insurance and Texas Lloyds, they knew and were charged with knowledge that these assets of Texas Lloyds which were transferred to ICT Insurance in consideration of ICT Insurance agreeing to take over all of the insurance business written by Texas Lloyds and assume all the outstanding obligations of Texas Lloyds either did not qualify as an admissible asset of an insurance company and/or were worthless. They knew and were charged with knowledge that the liabilities which were assumed by ICT Insurance far exceeded the valuable and admissible assets which were transferred to ICT Insurance as consideration for taking over such liabilities. They entered into such transaction in order to attempt to use such fictitious and worthless assets as capital to replace the $200,000.00 of fictitious capital created by the $200,000.00 fictitious loan that had been used as the original capital in the original incorporation. Such illegal, dishonest and fraudulent acts of such defendants constituted a breach of their fiduciary duty to ICT Insurance and by

such acts these defendants aided, abetted and furthered the conspiracy.

26.

Effective as of June 1, 1950, an Underwriting Management Agreement was entered into by and between ICT Insurance and Jack Cage and Company, a partnership composed of Ben Jack Cage and Jack V. Cage. Under the [fol. 44] terms of such Management Contract, ICT Insurance agreed to pay Jack Cage and Company 15 per cent of the gross net premiums with Jack Cage and Company agreeing to pay certain operating expenses. This Management Agreement with certain modifications and amendments as will hereinafter be shown was in effect up until February 1, 1956.

27.

Thereafter, in 1950, ICT Insurance sold policies of insurance and created additional liabilities in connection therewith in the form of unearned premium reserve on such new business written. ICT Insurance likewise incurred additional losses on policies assumed from Texas Lloyds and incurred losses on the new business written, thereby increasing its liabilities in connection therewith in the form of unpaid losses. ICT Insurance also incurred additional liabilities by virtue of reinsuring 75 per cent of the business of Continental Fire by reason of the fact that on the business assumed, ICT Insurance was required to maintain an unearned premium reserve on such business and likewise had to maintain a loss reserve on losses incurred on such business assumed.

28.

Under the Insurance Code, ICT Insurance was at all times required to maintain its authorized capital. Furthermore, under Article 4927 and 4995 RCS of Texas, now Articles 6.11 and 8.07, Texas Insurance Code, the President, Vice-President and Secretary, or a majority of the Directors of ICT Insurance were required to file on or before February 28, 1951, with the Board of Insurance Commissioners of the State of Texas, a verified statement of the

condition of ICT Insurance as of December 31, 1950 and as of December 31, of each succeeding year it was doing business. In such annual statement, it was required that the true financial condition of the company of ICT Insur-
[fol. 45] ance be shown. The annual statement was required to be made and filed in order that the Board could determine whether or not ICT Insurance had its required capital and had met the other requirements of the laws and was therefore entitled to a renewal of its Certificate of Authority to permit it to continue to do business for the next ensuing year. To further the conspiracy, a scheme was devised by the defendants Ben Jack Cage, Jack V. Cage, John G. Vaughan and the other Officers and Directors of ICT Insurance to enter into fictitious and fraudulent transactions for the purpose of falsely representing the true financial condition of ICT Insurance in its books and to enable them to make certain false entries in the annual statement of ICT Insurance as of December 31, 1950, to show the ICT Insurance had met the legal requirements to continue its operation.

29.

Because of the increase of ICT Insurance Company's liability in the form of reserves for unearned premiums and reserves for losses, and coupled with the fact that ICT Insurance was already hopelessly insolvent, it became necessary in order to attempt to show a solvent financial condition to enter into fictitious reinsurance contracts in an attempt to get rid of some of the liabilities of ICT Insurance and thereby show that ICT Insurance had the required capital and surplus. Furthermore, other transactions were entered into in an attempt to paint a false picture of solvency and liquidity on ICT Insurance Company's books and in its annual statement.

30.

In November 1950, a so-called quota share reinsurance agreement was entered into between ICT Insurance and Narragansett Insurance Company of Providence, Rhode Island, whereby Narragansett Insurance Company sup-
[fol. 46] posedly agreed to reinsure 90 per cent of certain

insurance business of ICT Insurance. Through a normal and legitimate quota share reinsurance treaty, the ceding company cedes to the assuming company an agreed percentage of all of its insurance policies for an agreed commission, payable by the assuming company to the ceding company, with the assuming company agreeing to pay the losses on the percentage agreed upon of the insurance policies ceded. Through such a reinsurance agreement, the assuming company is required to carry the liability for the unearned premium reserve on such business that it assumes and likewise is required to carry as a liability the unpaid losses at the percentage agreed upon in such treaty. That the effect of such a legitimate treaty is that the ceding company is obtaining insurance from another or the assuming company to help pay its losses by paying the assuming company a premium. The further effect of such a legitimate treaty is that in the ceding company, the liability for unearned premium reserve and for unpaid losses are reduced proportionately in the percentage as agreed upon in the contract. The treaty entered into between ICT Insurance and Narragansett in November 1950 was not a legitimate reinsurance treaty but was a treaty entered into for the sole purpose of reducing the liabilities for unearned premium reserve and for unpaid losses of ICT Insurance in order that it could show a solvent financial condition. Under the fictitious reinsurance treaty that ICT Insurance was caused to enter into with Narragansett which is a so-called bankers type quota share reinsurance treaty, Narragansett did not obligate itself to pay any of the losses under the insurance policies that it was supposedly reinsuring of ICT Insurance. The whole effect of such treaty was that ICT Insurance agreed to pay to Narragansett a certain percentage of its earned premium in return for merely [fol. 47] carrying the unearned premium reserve and loss reserve of ICT Insurance in the amount of the percentage agreed upon in the reinsurance treaty. Through such subterfuge, ICT Insurance obtained surplus relief in the amount of $103,000.00 as of December 31, 1950.

31.

In November 1950, ICT Insurance was required to purchase 1,000 shares of the preferred stock of Cliff Towers Hotel Company from Continental Fire for a price of $100,000.00, which stock was not worth such value. This Cliff Towers Hotel Company stock was carried in the books of ICT Insurance until the latter part of December 1950. In furtherance of the conspiracy, at the end of December 1950, the Cliff Towers Hotel Company stock was taken out of ICT Insurance over the year-end for annual statement purposes through a temporary loan transaction as will be more fully hereinafter alleged.

32.

The purchase of the Cliff Towers Hotel Company stock by ICT Insurance for $100,000.00 came about in the following manner: On the 21st day of November 1950, an agreement was entered into by and between certain stockholders of Continental Fire designated as the Houston or Berry Group and certain stockholders of Continental Fire and Casualty designated as the Mills Group, collectively designated as Sellers, and Ben Jack Cage, John P. Moran and Arthur M. Brown, trustees and agents for La Comercial, and Stuart B. Hopps as Buyers. Under the terms of such agreement, the sellers agreed to sell to the buyers 18,102.75 shares of the 25,000 shares of Continental Fire issued and outstanding at a total stated consideration of $478,636.71, with a down payment of $287,182.03, with the balance payable in five equal annual installments, the first annual installment to become due and payable on or before January 15, 1952. At this time, Ben Jack Cage, John P. Moran and Arthur M. Brown were associates of Stuart B. Hopps; and at this time, La Comercial and Narragansett were controlled by Stuart B. Hopps and his Associates. Upon the entry of such agreement and in accordance therewith, the buyers and their associates were elected as officers and directors of Continental Fire and certain of the sellers and their representatives continued to act as officers and directors. That further, upon such agreement, in November 1950, Francis J. Knoll, an associate of Stuart B.

[fol. 48]

Hopps, was moved from the Hopps'-controlled Narragansett Insurance Company to Dallas, Texas, as an employee of Continental Fire and as a watch-dog over Continental Fire on behalf of the Hopps and Cage Groups and to carry out their scheme of the Hopps and Cage Groups to manipulate and drain the cash out of Continental Fire in order to use such cash of Continental Fire to pay to the sellers the purchase price agreed to be paid for the Continental stock. Their plan and scheme was to use the assets of Continental Fire for the purchase of Continental Fire's stock for their own benefit.

33.

In connection with the sale of the stock of Continental Fire, the Berry Group refused to warrant the value of the 1,000 shares of Cliff Towers Hotel Company stock at the value of $100,000.00 and the Hopps and Cage Groups refused to accept such stock at such value of $100,000.00 in arriving at the consideration paid by the buyers for the stock of Continental Fire. It was agreed that the Mills Group would, at a later date, purchase the Cliff Towers Hotel Company stock out of Continental Fire out of the consideration paid to them by the buyers for Continental [fol. 49] Fire stock.

34.

The down payment paid by the buyers to the sellers in the amount of $278,182.03 was paid in the following manner: Narragansett Insurance Company sold certain of its assets, and with the proceeds thereof, issued its check in the amount of $345,000.00 to Commercial Underwriters Corporation, a Hopps'-controlled company. Commercial Underwriters Corporation issued its check to ICT Insurance in the amount of $244,388.49; then the ICT Insurance issued its check in the same amount, payable to the Mercantile Bank who was acting as trustee in such sale. To make up the balance of the $287,182.03, Jack Cage and Company issued its check in the amount of $17,793.53 and $25,000.00 all of which made up the total down payment of $287,182.03. In order to replace the $244,388.49 that was temporarily taken out of Narragansett and to carry out

the scheme of the buyers purchasing Continental Fire stock out of Continental's own assets, a fictitious temporary reinsurance agreement was entered into between Continental Fire and Narragansett, under which Continental Fire paid to Narragansett the sum of $322,500.00, which replaced the funds used by Narragansett, thus giving back to Narragansett an amount in excess of which it had furnished. At the same time, ICT Insurance was caused to credit Continental Fire $322,500.00 on the Reinsurance Account between Continental Fire and ICT Insurance. Therefore, assets of ICT Insurance in the amount of $322,500.00 were used by the buyers as the down payment on the purchase of Continental Fire stock for their own benefit, which transaction will be hereinafter further alleged. As a part of this transaction, and in order to get cash in the amount of $322,500.00 [fol. 50] in Continental Fire in order that Continental Fire would have available cash to pay the $322,500.00 to Narragansett, Ben Jack Cage caused ICT Insurance to pay to Continental Fire $100,000.00 for the Cliff Towers Hotel Company stock which occurred on November 18, 1950. This transaction between ICT Insurance and Continental Fire, whereby ICT Insurance was caused to purchase the 1,000 shares of Cliff Towers Hotel Company stock at $100,000.00 when such stock was not worth such value, occurred between two corporations having interlocking officers and directors, was not an arm's length transaction as between such corporations, and was a fraud perpetrated upon ICT Insurance; that the participation of Ben Jack Cage and the other officers and directors of ICT Insurance who participated in and/or knew, and/or should have known, the fraudulent aspects of this transaction, was a breach of their fiduciary duty to ICT Insurance, and by the acts of Stuart B. Hopps, John P. Moran, Francis J. Knoll, and Arthur M. Brown, they joined in and aided such officers and directors in the breach of their fiduciary duties to ICT Insurance; and by their fraudulent acts, all of such persons aided, abetted and furthered the conspiracy.

35.

As hereinbefore alleged, in order to further the conspiracy and paint a false financial picture of ICT Insur-

ance in its annual statement as of December 31, 1950, in order to aid in the fraudulent obtaining of a Certificate of Authority for ICT Insurance to continue to do business in 1951, the $100,000.00 worth of Cliff Towers Hotel Company stock was taken out of ICT Insurance over the year-end through a fictitious loan transaction. This transaction occurred as follows: On December 20, 1950, Ben Jack Cage [fol. 51] approached Meyer J. Rachofsky, an officer of the Mercantile Bank, for a loan of $100,000.00 to Ben Jack Cage with the agreement and understanding that Ben Jack Cage would use this $100,000.00 to allegedly purchase the 1,000 shares of Cliff Towers Hotel Company stock from ICT Insurance and then put up the 1,000 shares of Cliff Towers Hotel Company stock with the Mercantile Bank as security for such $100,000.00 loan, but with an agreement from ICT Insurance that ICT Insurance would repurchase such stock after January 1, 1951. On December 28, 1950, the Mercantile Bank made the $100,000.00 loan to Ben Jack Cage; Ben Jack Cage deposited the $100,000.00 in his bank account in the Mercantile Bank, and on December 29, 1950, issued his check to ICT Insurance for the alleged purchase of Cliff Towers Hotel Company stock. However, the stock was put up with the Mercantile Bank as security on December 28, 1950, the day before. As shown by the loan memorandum of the Mercantile Bank, ICT Insurance had written its letter to the Mercantile Bank at the instance of Ben Jack Cage, by the terms of which ICT Insurance agreed to purchase the Cliff Towers Hotel Company stock after January 1, 1951. On the same date, December 29, 1950, that ICT Insurance received the $100,000.00 check from Ben Jack Cage, ICT Insurance deposited such $100,000.00 in its bank account, and on the same date, purchased $100,000.00 worth of U.S. Treasury Bills from the Mercantile Bank and the $100,000.00 worth of U.S. Treasury Bills was carried in ICT Insurance Company's annual statement as of December 31, 1950, at such value of $100,000.00.

36.

On January 2, 1951, the Mercantile Bank sold the $100,000.00 worth of U.S. Treasury Bills, deposited the $100,000.00 in ICT Insurance Company's account, and is-

[fol. 52] sued a deposit slip to ICT Insurance in the amount of $100,000.00, showing such deposit in ICT Insurance Company's account. On January 10, 1951, ICT Insurance Company's check was issued to Ben Jack Cage in the amount of $100,000.00 for the alleged purpose of repurchasing the Cliff Towers Hotel Company stock. On the same date, Ben Jack Cage used this $100,000.00 to repay the $100,000.00 loan at the Mercantile Bank. The Mercantile Bank was paid interest of $108.33 on such loan.

37.

At the time of entering into the transaction, the Mercantile Bank knew and was charged with knowledge that ICT Insurance was required to file an annual statement as of December 31, 1950, showing its financial condition. The Mercantile Bank knew that the loan transaction was for year-end statement purposes. The Mercantile Bank knew and was charged with knowledge that based upon this transaction, ICT Insurance would show in its annual statement that it owned $100,000.00 worth of U.S. Treasury Bills. The Mercantile Bank knew that under the terms of the loan agreement that immediately after the year-end, ICT Insurance was obligated to repurchase the Cliff Towers Hotel Company stock with the proceeds of the sale of the Treasury Bills and knew that at no time did ICT Insurance have the free and unrestricted use of the $100,000.00 in cash or in U.S. Treasury Bills with which to pay its claimants and creditors. The Bank knew and was charged with knowledge that the annual statement as of December 31, 1950, was required to be filed in order that the Board could determine whether or not ICT Insurance had the required capital and had met the other requirements of law in order to permit it to continue to do business for the year 1951. The Mercantile Bank further knew and was charged with knowledge [fol. 53] that the $100,000.00 worth of U.S. Treasury Bills would be carried by ICT Insurance in its sworn annual statement, and that it would be represented in such statement that ICT Insurance owned the $100,000.00 worth of U.S. Treasury Bills in order to show that it had the required capital to continue to do business. Furthermore, the Bank

knew and was charged with knowledge that such representation made in such annual statement was a representation to the existing and prospective claimants, creditors, policyholders, and stockholders that ICT Insurance had the free and unrestricted use of this $100,000.00 worth of U.S. Treasury Bills with which to meet its obligations. By these dishonest and fraudulent acts of the Mercantile Bank, the Mercantile Bank aided and abetted the officers of ICT Insurance in the breach of their fiduciary duties to ICT Insurance and such fraudulent acts constituted a part of the existing conspiracy and furthered, aided and abetted same. Furthermore, Ben Jack Cage and the other officers and directors of ICT Insurance knew and/or were charged with knowledge of all of the facts relating to this transaction. These defendants knew and/or were charged with knowledge, that ICT Insurance was insolvent, and it was necessary to create fictitious, false, and watered assets and dress up its annual statement so that ICT Insurance could obtain a renewal of its Certificate to continue to operate and do business. They knew and/or were charged with knowledge, that ICT Insurance was insolvent, and that the 1,000 shares of Cliff Towers Hotel Company stock was not worth the value of $100,000.00, and therefore, could not be carried in the statement at the value of $100,000.00. That this $100,000.00 loan transaction was entered into in order, through such transaction, $100,000.00 worth of U.S. Treasury Bills could be substituted for such Cliff Towers Hotel Company stock. They knew that when the $100,000.00 worth of U.S. Treasury Bills was carried as a free and unen- [fol. 54] cumbered asset of ICT Insurance in ICT Insurance Company's books and annual statement, that ICT Insurance could not use the $100,000.00 worth of U.S. Treasury Bills with which to meet its obligations because such $100,000.00 worth of U.S. Treasury Bills was earmarked and restricted and was to be used to allegedly repurchase the Cliff Towers Hotel Company stock from Ben Jack Cage and the Mercantile Bank in order that the $100,000.00 could be used to repay the Mercantile Bank year-end loan. Ben Jack Cage, Francis J. Knoll, and John P. Moran devised this scheme and carried it out with the aid of the Mercantile Bank. That by reason of such fraudulent acts of these defendants and the other officers and directors of ICT Insurance who

participated in, and/or knew, and/or should have known, the fraudulent aspects of this transaction was a breach of their fiduciary duty to ICT Insurance, and by the acts of the Mercantile Bank, Francis J. Knoll and John P. Moran, they joined in and aided such officers and directors in the breach of their fiduciary duties to ICT Insurance; and by such fraudulent acts, all of such persons aided, abetted, and furthered the conspiracy.

In the alternative, the Receiver alleges that by reason of the fact that the Mercantile Bank joined, aided, and abetted the misrepresentation in ICT Insurance Company's annual statement that the $100,000.00 was a free and unencumbered property of ICT Insurance, that the bank was estopped from contending otherwise, and that when the $100,000.00 was withdrawn from the account of ICT Insurance and repaid to the Mercantile Bank in payment of the personal loan of Ben Jack Cage, such act constituted a conversion and misappropriation of the assets of ICT Insurance by the Mercantile Bank to the benefit of the Bank, which amount of $100,000.00, the Receiver herein sues to recover from the Mercantile Bank.

[fol: 55] 39.

After the fraudulent transactions as hereinabove set forth were entered into to fictitiously increase ICT Insurance Company's assets and decrease its liabilities, the annual statement of ICT Insurance as of December 31, 1950, was prepared under the direction and supervision of the Officers and Directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by Ben Jack Cage, President, J. K. Leaman as Assistant Secretary, and Marshall Bivens as Assistant Treasurer, and was filed with the Board in Austin, Travis County, Texas. This annual statement contained at least the following false statements:

(a) On page 18, under schedule B, "Mortgages Owned," it was stated that as of December 31, 1950, ICT Insurance owned as an asset a First Mortgage in the amount of $85,000.00 on the Sugarland Ranch in Ft. Bend County, Texas, when in truth and in fact, such First Mortgage Loan

did not comply with the requirements of the Insurance Code as hereinbefore shown, and such First Mortgage was therefore not an admissible asset.

(b) On page 18, under schedule B, "Mortgages Owned," and on page 2, it was represented that as of December 31, 1950, ICT Insurance owned a First Mortgage in the amount of $100,000.00, executed by Garth W. Daniel and Equitable Realty Corporation on property located in Travis County, Texas, when in truth and in fact, as hereinbefore shown, such First Mortgage did not comply with the requirements of the Insurance Code as an admissible asset and was worthless for statement purposes.

(c) On page 21, under schedule D—Part 1, "Bonds Owned," and on page 2, it was stated that ICT Insurance owned as an asset, Debenture Bonds of North American [fol. 56] Development Company at the value of $96,000.00, when in truth and in fact, as hereinbefore shown, such Debenture Bonds were not an admissible asset and such bonds were worthless.

(d) On page 21, under schedule D—Part 1, "Bonds Owned," and on page 2, it was stated that ICT Insurance owned as an asset, Debenture Bonds of Coastal Development Company at the value of $96,000.00, when in truth and in fact, as hereinbefore shown, these debenture bonds were not an admissible asset under the insurance laws and such bonds were worthless.

(e) On page 21, under schedule D—Part 1, "Bonds Owned," and on page 2, it was stated that ICT Insurance owned as an admissible asset, $200,000.00 of U.S. Treasury Bonds, when in truth and in fact, as hereinbefore shown, $100,000.00 of such bonds were U.S. Treasury Bills which were purchased with the proceeds of the $100,000.00 loan from the Mercantile Bank, and which U.S. Treasury Bills were not a free and unrestricted asset of ICT Insurance since such U.S. Treasury Bills were earmarked to repay the Mercantile loan.

(f) On page 22, under schedule D—Part 2, "Stocks Owned," and on page 2, it was stated that as of December 31, 1950, ICT Insurance owned 500 shares of the preferred

stock of Bankers Discount Corporation, worth a value of $50,000.00, when in truth and in fact, as hereinabove shown, such stock did not comply with the requirements of the Insurance Code as admissible assets.

(g) On page 3, under "Liability, Surplus and Other Funds," of the statement, it was stated that as of December 31, 1950, ICT Insurance did not owe any amount for borrowed money, when in truth and in fact, the $100,000.00 loan transaction entered into on December 29, 1950, between Ben Jack Cage and the Mercantile Bank was in effect a [fol. 57] loan to ICT Insurance, with the understanding and agreement that the proceeds of such loan would be held by ICT Insurance and used to repay such loan after the year-end and with no right of ICT Insurance to use the proceeds from such loan during the interim for its free and unrestricted use in paying obligations of creditors and claimants.

(h) On page 3, under "Liability, Surplus and Other Funds," of the statement, it was stated that ICT Insurance had only a total liability of $1,046,673.03, which statement was false for the reason that, in truth and in fact, such liability was $103,923.90 greater by virtue of the false and fictitious reinsurance treaty entered into with Narragansett Insurance Company for the sole purpose of decreasing the net liabilities by this amount of $103,923.90 for statement purposes.

(i) On page 3, under "Liability, Surplus and Other Funds," it is stated that ICT Insurance had a capital of $200,000.00 and unassigned funds or surplus in the amount of $111,064.83, or a surplus as regards policyholders in the total amount of $311,064.83, when in truth and in fact, ICT Insurance had no capital and no surplus and was hopelessly insolvent.

40.

During the year 1950, and at the time the December 31, 1950 annual statement of ICT Insurance was prepared, and at the time said statement was submitted to the Board of Insurance Commissioners, the following defendants were

officers and/or directors and/or trustees of ICT: Jack V. Cage, Ben Jack Cage, John G. Vaughan, Marshall F. Bivens, Robert F. Talbott, L. W. Kellogg, Garth W. Daniel, O. Z. Gulledge, and J. K. Leaman. At the time that these false, fraudulent, and fictitious financial transactions were entered into, and at the time that the false statements were made in the annual statement, and at the time that such annual statement was submitted to the Board of In- [fol. 58] surance Commissioners, each of these defendants either participated in such fraudulent transactions and/or knew and/or were charged with knowledge of the fraudulent aspects of such financial transactions and that some or all of such statements were false or as officers and/or directors they negligently and carelessly permitted such fraudulent and fictitious transactions to be entered into and such false statements to be made and submitted to the Board, when with ordinary care in exercising their duties as officers and/or directors, they could have and should have known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made with the intent that the same should be submitted to the Board of Insurance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a certificate certifying that ICT Insurance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1951. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a certificate of such compliance would be circulated as required by law and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders and stock subscribers that ICT Insurance had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and these classes of persons and was a breach of such officers' and directors' fiduciary duty to ICT Insurance and were a part of and in furtherance of and in aid of the conspiracy; that by the hereinbefore alleged acts of

the persons and entities hereinbefore named, other than such officers and directors in entering into, aiding, participating, and joining in the fraudulent acts hereinbefore alleged which were entered into to fictitiously increase [fol. 59] ICT Insurance Company's assets and fictitiously lower its liabilities, such parties joined in, aided, and abetted the officers and directors in the making of such false and fraudulent December 31, 1950 annual statement of ICT Insurance and thereby aided and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance, and all of which acts were a part of and in furtherance of and in aid of the conspiracy. The false statements in ICT Insurance Company's annual statement and submitted by its officers to the Board were statements made directly to the Board, were statements made as to material facts and was, and were relied upon by said Board as the truth and did cause the Board to issue a Renewal Certificate of Authority to ICT Insurance to continue to do business in 1951, together with a Certificate of Publication which was published in two newspapers of wide circulation as required by law.

41.

In April 1951, Nile E. Ball was a member of the law firm of Mullinax, Wells and Ball. At that time, and prior to that time, such firm had been representing organized labor. Nile E. Ball had for some time been looking around for an insurance company closely owned by management with the idea that management would sell a large block of stock in such insurance company to organized labor. In April 1951, Nile E. Ball met Ben Jack Cage and discussed with Ben Jack Cage his idea about organized labor getting into the insurance business through stock ownership. Pursuant to such discussions, Nile E. Ball contacted William J. Harris, then President of the Texas State Federation of Labor, A.F. of L. and members of such organization's Executive Board. On the 11th day of May 1951, an agreement was entered into by and between Ben Jack Cage and Associates on the one hand, and with William J. Harris and Nile E. Ball representing the Texas State Federation of Labor on the other. Such agreement was signed on behalf of Ben

[fol. 60] Jack Cage and Associates by Ben Jack Cage, Wm. Ross Kennedy, Garth W. Daniel, and John G. Vaughan. In such agreement, Ben Jack Cage and Associates agreed with William J. Harris, President of the Texas State Federation of Labor and Nile E. Ball to sell to the labor unions of Texas and to the individual members of labor unions the controlling interest in, to the extent of at least 51 per cent and up to 66⅔ per cent of the stock of ICT Insurance. Subsequent to entering into such agreement, Nile E. Ball and William J. Harris contacted various members of the Texas State Federation Executive Board and various leaders in organized labor, and on June 25, 1951, at the 53rd Annual Convention of the Texas State Federation of Labor held in Galveston, Texas, adopted a resolution recommending that the Texas State Federation of Labor endorse a purchase in the controlling interest in ICT Insurance and recommended to all A.F. of L. Locals in Texas and their members the purchase of ICT Insurance Company's stock. The board further recommended that the President, Secretary and Vice-President of the A.F. of L. elected at the 53rd Convention be authorized to serve as directors of ICT Insurance until the first stockholders' meeting after the labor management had purchased the such controlling interest.

42.

On May 11, 1951, at the time that such agreement was entered into as between Ben Jack Cage and Associates on the one hand, and William J. Harris and Nile E. Ball on the other, there was outstanding 20,000 shares of capital stock of ICT Insurance, being the original authorized and issued capital stock of ICT Insurance. In the original incorporation as hereinbefore alleged, the original $200,000.00 capital represented by the $200,000.00 temporary loan at the Mercantile Bank was used to incorporate ICT Insurance. Of the 20,000 original snares of ICT Insurance, it was represented in the Charter Application to the Attorney General and to the Board that 19,998 shares were subscribed [fol. 61] and paid for by Ben Jack Cage and it was represented that one share each had been subscribed for and paid for by Jack V. Cage and John G. Vaughan. After

such incorporation, pursuant to such reinsurance agreement as between ICT Insurance and Texas Lloyds, the original 20,000 shares of capital stock of ICT Insurance was issued to the Underwriters of Texas Lloyds in proportion to the alleged underwriting interest that the underwriters had in Texas Lloyds prior to Texas Lloyds' merger into ICT Insurance. In exchange for Ben Jack Cage's underwriting interest in the amount of $200,000.00 in Texas Lloyds, he was issued 11,428.57 shares of the capital stock of ICT Insurance; in exchange for Garth W. Daniel's underwriting interest in the amount of $75,000.00, he was issued 4,285.72 shares of the capital stock of ICT Insurance; such underwriting interest in the amount of $75,000.00 in Texas Lloyds was given to Garth W. Daniel in exchange for the $100,000.00 First Mortgage Note as hereinbefore discussed; in exchange for the underwriting interest of Wm. Ross Kennedy in the amount of $50,000.00, he was issued 2,857.14 shares of the capital stock of ICT Insurance; such original $50,000.00 of underwriting interest of Texas Lloyds having been acquired by Wm. Ross Kennedy in exchange for the $50,000.00 stock of Bankers Discount Corporation as hereinbefore alleged; in exchange for $25,000.00 underwriting interest of A. B. Dupuy in Texas Lloyds, he was issued 1,428.57 shares of the capital stock of ICT Insurance, and that such $25,000.00 underwriting interest of A. B. Dupuy in Texas Lloyds was given to him by Texas Lloyds in exchange for a loan by A. B. Dupuy to Texas Lloyds in the amount of $25,000.00.

43.

In such agreement of May 11, 1951, between Ben Jack Cage and Associates and William J. Harris and Nile E. [fol. 62] Ball, it was agreed that 14,373 shares of the outstanding 20,000 shares of stock owned by the following people would be sold to organized labor through a trustee arrangement with the Mercantile Bank. Through such arrangement, a scheme was devised to use the proceeds from the sale of such stock to purchase certain worthless assets out of ICT Insurance and to give to the persons who permitted such assets to be used a profit for their use. It was agreed that the 4,285 shares owned by Garth W. Daniel, the

2,857 shares owned by Wm. Ross Kennedy, the 1,428 shares owned by A. B. Dupuy, and the 5,678 shares of the 11,428.57 shares owned by Ben Jack Cage, totalling 14,373 shares would be sold to Labor at $20.00 per share.

44.

An agreement was entered into by and between Ben Jack Cage and Associates and the Mercantile Bank, whereby the Mercantile Bank would act as transfer agent for the stock and as the depository under a Trust arrangement, whereby the proceeds from the sale of such 14,373 shares of stock would be deposited in the Bank in trust accounts for the payment over of such monies to persons designated by Ben Jack Cage and Associates.

45.

In connection with the sale of the 2,857 shares of the stock of ICT Insurance held by Wm. Ross Kennedy to organized labor under such agreement, it was agreed by and between Wm. Ross Kennedy and J. G. Vaughan, acting as Secretary-Treasurer of ICT Insurance, that of the $57,140.00 paid into such Trust Account in the Mercantile Bank for such stock at the value of $20.00 per share, the first $7,140.00 or any part thereof would be deposited to the account of Wm. Ross Kennedy, and a deposit slip made to him, and the balance of the proceeds amounting to $50,000.00 would be paid over to ICT Insurance as considera- [fol. 63] tion for the return to Wm. Ross Kennedy of the preferred stock of Bankers Discount Corporation. The 2,857 shares of the stock of ICT Insurance held by Wm. Ross Kennedy was sold to members of organized labor and $7,140.00 from the proceeds of such sale was paid over to Wm. Ross Kennedy, and the balance of $50,000.00 was transferred to the account of ICT Insurance. Through such means, the $50,000.00 worth of worthless stock of Bankers Discount Corporation was taken out of ICT Insurance, and Wm. Ross Kennedy was given a profit in the amount of $7,140.00 for the use of such Bankers Discount Corporation stock, all by the use of money paid in by members of organized labor for the stock of ICT Insurance Company.

46.

An agreement was likewise entered into between Garth W. Daniel and J. G. Vaughan, acting as Secretary and Treasurer of ICT Insurance, whereby it was agreed that from the proceeds of the sale of the 4,285 shares of the stock of ICT Insurance held by Garth W. Daniel at $20.00 per share, amounting to a total of $85,700.00, the first $10,700.00 or any part thereof would be deposited to the account of Garth W. Daniel and a deposit slip mailed to him, and that the balance of the proceeds amounting to $75,000.00 should be paid over to ICT Insurance and would be applied to the payment of the $100,000.00 mortgage executed by Garth W. Daniel and Equitable Realty Corporation on the Travis County property as hereinbefore alleged. By such transaction, $75,000.00 received from unions and union members for such stock was used to milk $75,000.00 water out of the $100,000.00 fictitious mortgage and the balance of $10,700.00 received from union members for such stock was given to Garth W. Daniel for his entering into the fraudulent transaction and for the use of such fictitious [fol. 64] mortgage as an asset in Texas Lloyds and ICT Insurance.

47.

As hereinbefore alleged, the underwriting interest of A. B. Dupuy to Texas Lloyds in the amount of $25,000.00, was given to him in exchange for a loan to Texas Lloyds in the amount of $25,000.00. Therefore, in exchange for his underwriting interest in Texas Lloyds in the amount of $25,000.00, A. B. Dupuy was issued 1,428.57 shares of the capital stock of ICT Insurance. On January 27, 1951, Jack Cage and Company of Texas paid off the loan to A. B. Dupuy, in the amount of $25,000.00, and at which time, the 1,428.57 shares of ICT Insurance stock was transferred to John G. Vaughan, as Trustee. Such shares were sold to members of organized labor at $20.00 per share for a total of $28,490.00, which amount was paid over to Jack Cage and Company of Texas. As a result of such transaction, Jack Cage and Company of Texas made an unjust profit of $3,490.00.

48.

The proceeds from the sale of the 5,678 shares of ICT Insurance stock held by Ben Jack Cage that was sold to organized labor in the total amount of $116,060.00 was deposited in a special account of ICT Insurance in the Mercantile Bank and $115,000.00 of this amount was transferred to the capital stock account of ICT Insurance for the purpose of effecting a capital stock increase in December 1951 as will be more fully hereinafter alleged.

49.

Through such means, the controlling interest of ICT Insurance represented by the 14,373 shares of stock was sold to unions and union members, and through such transactions as hereinbefore alleged, the proceeds from the sale of such stock was used to replace worthless assets of ICT [fol. 65] Insurance and to give to Garth W. Daniel, Wm. Ross Kennedy and Ben Jack Cage and Jack Cage and Company of Texas unjust profits on such transactions; that such transactions were a fraud perpetrated as against ICT Insurance and as against the purchasers of such stock; that at the time such stock was sold, these defendants, along with the other officers and directors knew, and/or were charged with knowledge that ICT Insurance was insolvent, even though certain of its worthless assets as hereinbefore alleged were replaced with cash paid in by union members for such stock; that through such scheme of selling the controlling interest of ICT Insurance to organized labor, the stage was set for the continued sale of ICT Insurance stock to organized labor, and through such means, to get into ICT Insurance, cash, in order to enable it to continue operating, although all through its continued existence it remained hopelessly insolvent; that the sale of such stock was a fraud as to ICT Insurance in that it incurred liabilities and obligations which ICT Insurance was unable to meet. All of such acts of these defendants, Ben Jack Cage, John G. Vaughan, William Ross Kennedy and Garth W. Daniel, were in violation of their fiduciary duties to ICT Insurance and aided and furthered the existing conspiracy.

50.

In November 1951, Ben Jack Cage and John G. Vaughan as original incorporators, incorporated Jack Cage and Company of Texas. All of the assets of Jack Cage and Company, a partnership, including the management contract that Ben Jack Cage and John G. Vaughan had with ICT Insurance were transferred to Jack Cage and Company of Texas. As the consideration for the part played by Nile E. Ball in selling organized labor on buying controlling interest in ICT Insurance, Nile E. Ball was given 3,899 shares of the total outstanding shares in the amount of [fol. 66] 10,000 shares of Jack Cage and Company of Texas, and in addition, Nile Ball was put on the payroll of Jack Cage and Company of Texas at $25,000.00 per year and other considerations. In consideration fo the part played by William J. Harris as President of the Texas State Federation of Labor in selling labor on purchasing control in ICT Insurance, he was put on the payroll of Jack Cage and Company of Texas at $500.00 per month, and Paul C. Sparks, who was Executive Secretary of the Texas State Federation of Labor at the time that the controlling interest of ICT Insurance was sold to labor, was likewise put on Jack Cage and Company's payroll at approximately $500.00 per month for the part he played in selling labor on purchasing control in ICT Insurance.

51.

In connection with the sale of the controlling interest of ICT Insurance to organized labor at a meeting of the Board of Directors of ICT Insurance on July 23, 1951, officers of the State Federation of Labor, A.F. of L., were elected as members of the Board of Directors of ICT Insurance.

52.

On September 29, 1951, the Underwriting Management Agreement between Jack Cage and Company of Texas and ICT Insurance was amended in which amendment it was agreed as between the Directors of ICT Insurance and Jack Cage and Company of Texas that Jack Cage and Com-

pany of Texas would have the exclusive authority as Sales Agent for all securities issued by ICT Insurance and/or its subsidiaries. As such agent, Jack Cage and Company of Texas was allowed a commission of 20 per cent for the sale of the subsequent issues of stock of ICT Insurance.

53.

As hereinbefore alleged, the original capital of ICT [fol. 67] was supposedly $200,000.00, represented by 20,000 shares of par stock at the par value of $10.00 per share. In connection with the sale of stock of ICT Insurance to unions and union members, in November 1951, JACCO of Texas had sold $135,000.00 worth of stock of ICT Insurance over and above its authorized 20,000 shares and had sold $350,000.00 more than was authorized on an installment basis. In September 1951, it became obvious that it was necessary to effect a capital increase of ICT Insurance in order that stock could be issued to the unions and union members who had paid in the $135,000.00 for stock and to fulfill the stock subscriptions to the unions and union members who had subscribed for the additional $350,000.00 worth of stock. On December 6, 1951, Ben Jack Cage, as President, and John G. Vaughan, as Secretary of ICT Insurance, signed and filed a Certificate of Amendment to the Articles of Incorporation of ICT Insurance for an amendment to the Articles of Incorporation of ICT Insurance so as to increase the capital stock from $200,000.00 to $400,000.00 by issuing 20,000 additional shares of common voting stock at a par value of $10.00 each. On the same date, in connection with such Charter Amendment, Ben Jack Cage and John G. Vaughan made the following affidavit:

"Affidavit as to the payment of increase in Capital Stock of the Insurance Company of Texas"

State of Texas)
)
County of Dallas)

Before me, the undersigned authority, on this day personally appeared Ben Jack Cage and J. G. Vaughan, known to me, each of whom having been duly sworn

on his oath, states for himself that they, the said, Ben Jack Cage and J. G. Vaughan, are president and secretary, respectively of The Insurance Company of Texas.

That they are the identical parties who executed the Certificate of Amendment of the Articles of Incorpora- [fol. 68] tion of said corporation whereby its capital stock was increased so that as increased said capital stock amounts to $400,000.00 divided into 40,000 shares of common voting stock of a par value of $10.00 each.

That the increase in the amount of common stock of the said corporation amounts to $200,000.00 represented by 20,000 shares of common voting stock with a par value of $10.00 each, fully paid in cash and credited to the capital stock account of the said corporation.

/s/ Ben Jack Cage
/s/ J. G. Vaughan

Subscribed and sworn to, before me by the said Ben Jack Cage and J. G. Vaughan, on this the 6th day of December, 1951.

/s/ E. Wells
Notary Public in and for Dallas,
Dallas County, Texas"

An affidavit was procured from Meyer J. Rachofsky, Vice President of the Mercantile Bank, which affidavit was sworn to on the 6th day of December 1951, and wherein Meyer J. Rachofsky swore as follows:

"State of Texas)
)
County of Dallas)

Before me, the undersigned authority, on this day personally appeared Meyer Rachofsky, of Dallas, Texas, who after being duly sworn, on his oath, deposes and says:

That he is the Vice President of the Mercantile National Bank of Dallas, Texas, and he knows of his knowledge that The Insurance Company of Texas, a

corporation of Dallas, Texas, has on deposit in said bank the sum of Two Hundred Thousand Dollars ($200,000.00) in a Special Capital Stock account, and that said funds are not a part of the General Account, and are subject to the check of the corporation and wholly and entirely at the disposal of The Insurance Company of Texas, insofar as said bank is concerned; that no other person, firm, or corporation, has any interest in or claim to said funds, and the said, The Insurance Company of Texas, is not indebted to said bank in any amount whatever, and that there are no offsets or counter claims against said money or any part thereof.

/s/ Meyer Rachofsky

Sworn and subscribed to before me by the said Meyer [fol. 69] Rachofsky, this the 6th day of December, 1951.

/s/ W. Evan Ellis,
Notary Public in and for
Dallas, Dallas County, Texas"

These instruments, together with a certified copy of Minutes of a Stockholders' meeting of ICT Insurance authorizing the capital increase, was submitted to the Attorney General of the State of Texas on the 10th day of December, 1951, and based upon the sworn representations contained therein, the Attorney General approved the Amendment to ICT Insurance Company's Articles of Incorporation, increasing its capital from $200,000.00 to $400,000.00 represented by an increase of 20,000 additional shares.

54.

At the time that such instruments were prepared, and at the time that they were executed and at the time they were submitted to the Attorney General for approval, and at the time that same were approved, Ben Jack Cage, John G. Vaughan and the Mercantile Bank knew that the additional 20,000 shares of the increased capital stock of ICT Insurance had not been fully subscribed and paid for and

that the representations contained in such Charter Amendment and affidavits were false. They knew this by reason of the fact that such capital increase was effected in the following manner: On November 29, 1951, Ben Jack Cage and John G. Vaughan made an application at the Mercantile Bank with Meyer J. Rachofsky, Vice President, for a loan of $150,000.00. It was stated that the purpose of the loan was to effect a capital increase of ICT Insurance in the amount of $400,000.00 represented by an increase of authorized shares in the number of 20,000 shares. It was represented to the Mercantile Bank by Ben Jack Cage and John G. Vaughan that the additional stock was being sold to the members of the Texas Federation of Labor, A.F. of L. by installment subscriptions; that $135,000.00 of the stock had already been sold to and paid for by the union members, [fol. 70] and that $350,000.00 more had been sold on an installment basis. It was further represented that since insurance laws require that all the stock be paid for in cash before it can be issued, that Ben Jack Cage proposed to purchase $265,000.00 balance of the unpaid stock and hold it until the installments were met; that the installments were coming in at the rate of $25,000.00 per month and would increase as the $50,000.00 remainder of the stock was sold; it was represented that Ben Jack Cage was using $115,000.00 of his own money to effectuate such stock increase. This $115,000.00 represented the proceeds from the sale of the 5,083 shares of the original 25,000 shares which were sold to the unions and union members through the depository arrangement with the Mercantile Bank, in accordance with the agreement as between Ben Jack Cage and Associates, and William J. Harris and Nile E. Ball as hereinbefore alleged. The stock of ICT Insurance was being sold at $20.00 per share; therefore, in order to effectuate such capital stock increase, it was necessary that the entire 20,000 shares at $20.00 per share or a total of $400,000.00 be paid into ICT Insurance. The $115,000.00 which represented the proceeds from the sale of the stock that Ben Jack Cage proposed to use, together with the $135,000.00 worth of stock that had already been sold, made up a total of only $250,000.00. Therefore, it was necessary

that additional funds in the amount of $150,000.00 be paid into ICT Insurance in order to effectuate such capital stock increase.

55.

In order to obtain such additional funds in the amount of $150,000.00, an agreement was entered into by and between Ben Jack Cage and Mercantile Bank, whereby the Mercantile Bank made a loan in such amount to Ben Jack Cage. It was agreed by and between Ben Jack Cage and Mercantile Bank that Ben Jack Cage would use the $150,-[fol. 71] 000.00 proceeds from such loan, together with the $115,000.00 for the alleged purpose of purchasing $265,-000.00 worth of the unpaid stock, or a total of 12,788 shares of the capital increase of the 20,000 shares and would then put such shares up as collateral with the Bank for such loan and would repay his loan from the collections under the stock subscriptions already obtained.

56.

On December 14, 1951, the Mercantile Bank loaned $150,-000.00 to Ben Jack Cage, being Note #8609, bearing interest at the rate of 5 per cent, and payable January 14, 1952, and Ben Jack Cage put up as collateral with the Mercantile Bank on the same date, 12,788 shares of ICT Insurance, represented by Capital Stock Certificate #841; 7,500 shares of Jack Cage and Company of Texas, represented by Certificate #101, and an assignment of two life insurance policies of Ben Jack Cage, totalling $200,000.00. On December 14, 1951, the $115,000.00 was deposited in the account of Ben Jack Cage in the Mercantile Bank, and on December 17, 1951, Ben Jack Cage issued his check in the amount of $140,930.00 to ICT Insurance, which check was deposited on the same date in ICT Insurance Company's account in the Mercantile Bank and was credited to surplus paid in by stockholders. This $140,930.00, together with the $115,-000.00 and the proceeds from the sale of stock that had already been sold, and collections on subscriptions, made up the total of approximately $400,000.00 paid into ICT Insurance on the capital stock increase.

57.

The $150,000.00 loan from the Mercantile Bank to Ben Jack Cage was finally paid off on February 19, 1952, with a total interest of $1,250.49. Under the terms of the agreement with the Mercantile Bank, Ben Jack Cage used the proceeds received under the stock subscriptions with which to repay said loan.

[fol. 72] 58.

At the time that the application for a Charter Amendment was made by Ben Jack Cage and John G. Vaughan, and at the time that they made their affidavit on December 6, 1951, that the additional 20,000 shares of stock had been fully subscribed and paid for, and at the time that Meyer J. Rachofsky made his affidavit to aid such defendants in the obtaining of such amendment to the Charter of ICT Insurance for the capital stock increase in the amount of 20,000 shares, defendants Ben Jack Cage, John G. Vaughan and the Mercantile Bank knew that the 20,000 shares of stock of ICT Insurance represented by such Charter Amendment had not been fully paid for. These defendants knew and are charged with knowledge that in order to effectuate the capital stock increase of ICT Insurance, the law required that the entire 20,000 shares of additional stock be paid for before the Charter Amendment could be obtained and before the stock could be issued, and therefore, the total amount of $400,000.00 would have to be paid into ICT Insurance, free and clear of any encumbrances. At the time that the loan was made by the Mercantile Bank to Ben Jack Cage, and at the time that the 12,788 shares of stock of ICT Insurance was allegedly issued to Ben Jack Cage as the alleged consideration for Ben Jack Cage's paying to ICT Insurance $140,930.00 out of the $150,000.00 proceeds from such loan, these defendants, Ben Jack Cage, John G. Vaughan and the Mercantile Bank knew that Ben Jack Cage was acting only as agent for ICT Insurance under a Management Contract in the sale of ICT stock. These defendants knew that as such agent, Ben Jack Cage did not have the authority to purchase such stock in his own name. These defendants knew

and are charged with knowledge of law that while acting as agent for ICT Insurance in such transaction, he was acting for his principal, ICT Insurance, and that in truth and in fact, the $150,000.00 loan was a loan to ICT Insurance; that if such loan was not a loan to ICT Insurance, [fol. 73] then these defendants are charged with knowledge and knew that Ben Jack Cage was using assets of ICT Insurance in the form of stock of ICT Insurance and proceeds from sales of ICT Insurance stock to secure his individual indebtedness and knew that he was using assets of ICT Insurance, being proceeds from the sale of stock which was ICT Insurance Company's money, to repay such individual indebtedness.

59.

Each of these defendants knew that to the extent of $140,930.00, that the capital increase in the amount of $400,000.00 was borrowed money; each of these defendants knew that under the law stock could not be sold outright or on an installment basis as authorized and unissued until such stock had been authorized through a Charter Amendment. These defendants knew that prior to such Charter Amendment, $135,000.00 worth of stock had been sold which was not authorized, and that subscriptions had been taken for the sale of $350,000.00 worth of stock that had not been authorized. Through the sale of unauthorized stock, and the use of borrowed money, these defendants misrepresented to the State that the entire amount of 20,000 shares of stock had been paid for; all of which acts were a fraud as against ICT Insurance and its claimants, creditors, policyholders, stockholders and the public. In the commission of such fraudulent acts, Ben Jack Cage and John G. Vaughan breached their fiduciary duty to ICT Insurance and the Mercantile Bank joined, aided, and abetted such officers and directors in such breach of their fiduciary duty to ICT Insurance, and by such acts all of these defendants aided, furthered, and abetted the conspiracy through the means of obtaining cash in ICT Insurance through the sale of its worthless stock, in order to obtain operating cash and to create surplus to keep ICT Insurance operating, although ICT Insurance was hopelessly insolvent.

[fol. 74] 60.

In the alternative, the Receiver alleges that by reason of the fact that the Mercantile Bank joined, aided and abetted Ben Jack Cage and John G. Vaughan in misrepresenting to the State that the full amount of the increased 20,000 shares of the capital stock of ICT Insurance had been fully paid in cash, the Bank was estopped from denying that the $150,000.00 representing the proceeds from such loan was not the free and unencumbered assets of ICT Insurance, and that when the Bank accepted assets of ICT Insurance in the repayment of such loan in such amount of $150,000.00, the Mercantile Bank converted and misappropriated assets of ICT Insurance in such amount of $150,000.00, which the Receiver herein sues to recover.

61.

During the year 1951, ICT Insurance was caused to continue to sell insurance policies and stock and to continue to incur losses under its insurance policies in force and continue to incur obligations to creditors, although ICT Insurance was insolvent. By reason of incurring such additional liabilities, it was necessary that ICT Insurance have additional assets to meet the reserves necessary to be maintained or to reduce its liabilities in order to show that ICT Insurance had the capital required by law. Therefore, to further the conspiracy, additional schemes were devised, and the old schemes were carried through to water the assets of ICT Insurance and to hide its liabilities so that ICT Insurance could be caused to show on its books that it had the capital required by law and so that it could be falsely represented in its annual statement as of December 31, 1951, that it had such capital and thereby a Renewal of its Certificate of Authority could be obtained so that ICT Insurance could be caused to continue to do business although insolvent in order that the defendants could continue to prey upon the unsuspecting public.

[fol. 75] 62.

As hereinbefore shown, one of the schemes devised was to sell the company's stock which had a par value of $10.00,

for a price of $20.00, or more, earmarking $10.00 of such proceeds from the sale of stock as surplus, and in such means give to ICT Insurance additional assets and surplus.

63.

During the year 1951, the bankers type quota share reinsurance treaty between ICT Insurance and Narragansett supposedly remained in force. As hereinbefore alleged, such treaty was not a bona fide reinsurance treaty and was entered into only for the purpose of showing ICT Insurance in a solvent condition by giving to ICT Insurance surplus relief. Through such subterfuge, ICT Insurance was caused to falsely show in its books a reduction of its total liabilities by hundreds of thousands of dollars, and which, as of December 31, 1951, amounted to a false reduction of such liabilities in the net amount of $316,016.28.

64.

In October, 1950, Ben Jack Cage, Jack V. Cage and John G. Vaughan, as original incorporators, incorporated the Home Life and Accident Insurance Company of Dallas, Texas, a Limited Life Insurance Company, with an original capital of $25,000.00, and a surplus of $12,500.00, and with a capital stock of 2,500 shares at $10.00 par value. Of such 2,500 shares that was authorized in the original Articles of Incorporation of Home Life and Accident Insurance Company, Ben Jack Cage subscribed and paid for 2,480 of such shares and Jack V. Cage and John G. Vaughan subscribed and paid for ten shares each, making up the total of 2,500 authorized and issued shares. On July 12, 1951, the Articles of Incorporation of Home Life and Accident Insurance Company was amended, increasing the capital from $25,000.00 represented by 2,500 shares, to a [fol. 76] capital of $50,000.00, represented by 5,000 shares of common stock of the par value of $10.00 per share. On August 30, 1951, 4,268 shares of Home Life and Accident Insurance Company (which company's name was changed to The Life Insurance Company of Texas and later to ICT Life Insurance Company) was placed in the assets of ICT Insurance. This was done in the following manner: The

shares of stock were transferred to ICT Insurance at a total value of $100,000.00, based upon $23.43 per share in exchange for North American Development Company Debenture Bonds, in the amount of $96,000.00, and an additional $4,000.00, being the alleged accrued interest due and owing on such bonds. This exchange occurred between Jack Cage and Company of Texas and/or Ben Jack Cage and ICT Insurance.

65.

As hereinbefore alleged, ICT Life Insurance Company was incorporated in 1950; therefore, under Article 4706, RCS, now Article 2.10 of the Insurance Code, such stock of ICT Life was not an admissible asset that could be carried by ICT Insurance for the reason that it was not the stock of a company that had been in existence for five years and that had paid a dividend for a period of five years. Furthermore, the ICT Life stock was not worth the value of $23.43 per share, or a total value of $100,000.00. The effect, therefore, by such transaction was that the non-admissible and worthless bonds of North American Development Company were substituted with the non-admissible stock of ICT Life. In September 1951, 555 shares of ICT Life stock was taken out of ICT Insurance by JACCO of Texas. As of December 31, 1951, ICT Insurance was caused to carry as an admissible asset 3,718 shares at a book and market value of $86,996.35, or a market value per share of $23.43.

66.

At the time that this transaction was entered into, Ben [fol. 77] Jack Cage, John G. Vaughan and JACCO of Texas knew and/or were charged with knowledge that the stock of ICT Life was not an admissible asset that could be carried in ICT Insurance. They knew that by such transaction, a non-admissible asset was being substituted with a non-admissible asset; the whole purpose of such transaction was to continue to falsify the financial picture of ICT Insurance; that by virtue of such fraudulent acts, these defendants violated their fiduciary duties to ICT Insurance and furthered, aided, and abetted the conspiracy.

As hereinbefore alleged, over the year-end 1950, 1,000 shares of Cliff Towers Hotel Company stock, with a purported value of $100,000.00 was temporarily removed from the assets of ICT Insurance through a loan transaction with the Mercantile Bank in order to paint a false picture in ICT Insurance Company's December 31, 1950 annual statement. The 1,000 shares of Cliff Towers Hotel Company stock were carried in ICT Insurance Company's books during the year 1951 at the value of $100,000.00. In order to further the conspiracy and again paint a false financial picture of ICT Insurance Company's financial condition in its annual statement as of December 31, 1951, so that ICT Insurance could fraudulently obtain a renewal of its Certificate of Authority to continue to do business in 1952, $60,000.00 worth of the Cliff Towers Hotel Company stock was taken out of ICT Insurance over the year-end through another fictitious loan transaction with the Mercantile Bank. On December 31, 1951, Ben Jack Cage again approached Meyer J. Rachofsky, Vice President of the Mercantile Bank, for a loan of $60,000.00, such loan to be made to Ben Jack Cage and with the agreement and understanding that Ben Jack Cage would use this $60,000.00 to, allegedly purchase 600 shares of the Cliff Towers Hotel Company [fol. 78] stock from ICT Insurance and then would put up the 600 shares of Cliff Towers Hotel Company stock with the Mercantile Bank as security for such $60,000.00 loan, but with an agreement from ICT Insurance that ICT Insurance would repurchase such stock before January 30, 1952. On December 31, 1951, the Mercantile Bank made the $60,000.00 loan to Ben Jack Cage. The $60,000.00 was deposited in the account of Ben Jack Cage in the Mercantile Bank, and on the same date, December 31, 1951, Ben Jack Cage issued his check to ICT Insurance for the alleged purchase of 600 shares of the Cliff Towers Hotel Company stock. On the same date, December 31, 1951, the 600 shares of Cliff Towers Hotel Company stock was put up as collateral by Ben Jack Cage on the personal loan by the Mercantile Bank to Ben Jack Cage. Likewise held as collateral for such loan by the Mercantile Bank was a letter of ICT Insurance, executed December 31, 1951, in which letter ICT Insur-

ance was caused by Ben Jack Cage to agree to purchase such stock at a par value plus accrued interest on the loan on or before January 30, 1952.

68.

On January 5, 1952, a check of ICT Insurance in the amount of $60,000.00, signed by Ben Jack Cage and John G. Vaughan, was issued to Jack Cage and Company of Texas for the alleged purpose of purchasing the 600 shares of the Cliff Towers Hotel Company stock. On January 7, 1952, Jack Cage and Company of Texas deposited ICT Insurance Company's check of $60,000.00 in the account of Jack Cage and Company of Texas in the Mercantile Bank. On the same date, Jack Cage and Company of Texas issued its check to "Yourselves," in the amount of $60,000.00, drawn on Jack Cage and Company of Texas account in the Mercantile Bank in repayment to the Mercantile Bank of the personal loan of Ben Jack Cage. None of the transactions involved herein between ICT Insurance and Jack Cage and Company of Texas were recorded in the books of Jack Cage and Company of Texas.

[fol. 79]

69.

At the time of entering into this transaction, the Mercantile Bank knew and was charged with knowledge that ICT Insurance was required to file an annual statement as of December 31, 1951, showing its true financial condition. The Mercantile Bank knew that the $60,000.00 loan transaction was for year-end statement purposes. The Mercantile Bank knew and was charged with knowledge that based upon this transaction, ICT Insurance would show in its annual statement that it had $60,000.00 in cash free and unencumbered. The Bank knew that under the terms of the loan agreement, that immediately after the year-end, ICT Insurance was obligated to repurchase the Cliff Towers Hotel Company stock plus accrued interest on the loan with the proceeds of such loan which had been placed in ICT Insurance Company's account in the Mercantile Bank. The Bank knew that at no time did ICT Insurance have free and unrestricted use of the $60,000.00

with which to pay the claims of its policyholders and debts due creditors. The Mercantile Bank knew that such $60,000.00 was earmarked for the sole purpose of being used to collateralize such personal loan of Ben Jack Cage and for the repayment of such personal loan of Ben Jack Cage. The Mercantile Bank knew, and was charged with knowledge, that the annual statement of ICT Insurance as of December 31, 1951 was required to be filed in order that the Board could determine whether or not ICT Insurance had the required capital and had met the other legal requirements of law to permit it to continue to do business for the year 1952. The Mercantile Bank further knew and was charged with knowledge that the $60,000.00 cash, being the proceeds from such loan would be carried by ICT Insurance in its sworn annual statement as a cash asset and that it would be represented that ICT Insurance owned such $60,000.00 in cash free and unrestricted in order to make up its required capital in order to permit ICT Insur-
[fol. 80] ance to continue to operate. Furthermore, the Mercantile Bank knew and was charged with knowledge that such representations made in such annual statement was a representation to the existing and prospective claimants, creditors, policyholders and stockholders that ICT Insurance had the free and unrestricted use of such $60,000.00. By such dishonest and fraudulent acts of the Mercantile Bank, the Mercantile Bank aided and abetted the officers and directors in the breach of their fiduciary duty to ICT Insurance and such fraudulent acts constituted a part of the existing conspiracy and further aided and abetted the same. Furthermore, Ben Jack Cage, John G. Vaughan and the other officers and directors of ICT Insurance knew, and/or were charged with knowledge of all of the facts relating to this transaction. These defendants knew, and/or are charged with knowledge that ICT Insurance was insolvent and it was necessary to create fictitious, false and watered assets and dress up its annual statement so that ICT Insurance could obtain its renewal of Certificate of Authority to continue to operate and do business. They knew, and/or were charged with knowledge, that ICT Insurance was insolvent, and that the Cliff Towers Hotel Company stock in the amount of 600 shares was not

worth such value of $60,000.00, and therefore, could not be carried in the annual statement at such value of $60,000.00. The $60,000.00 fictitious loan transaction was entered into in order that such $60,000.00 worth of such Cliff Towers Hotel Company stock could be substituted with $60,000.00 cash. They knew that when the $60,000.00 was carried in the annual statement as a free and unencumbered asset of ICT Insurance, that ICT Insurance could not use such $60,000.00 in cash to meet its obligations to its policyholders and creditors because such $60,000.00 cash was earmarked and restricted and was to be used to allegedly repurchase the Cliff Towers Hotel Company stock from Ben Jack Cage in order that he could then use the $60,000.00 to pay the Mercantile Bank year-end personal loan; that such [fol. 81] fraudulent acts were a breach of such officers and directors duty to ICT Insurance and were a part of and in furtherance of the overall conspiracy.

70.

The annual statement of ICT Insurance as of December 31, 1951, was prepared under the direction and supervision of the Officers and Directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by Ben Jack Cage as President, J. G. Vaughan as Secretary and J. G. Vaughan as Treasurer, and was filed with the Board in Austin, Travis County, Texas. The annual statement contained at least the following false statements:

(a) On page 21, under schedule D—part 1, "Bonds Owned," and on page 2, it was stated that ICT Insurance owned as an asset Debenture Bonds of Coastal Salvage Company at the value of $40,000.00. This $40,000.00 worth of bonds of Coastal Salvage Company was a part of the $100,000.00 worth of bonds of the Coastal Development as hereinbefore alleged. The name of Coastal Development Company was changed to Coastal Salvage Company in 1951, and furthermore, $56,000.00 worth of such bonds had been taken out of ICT Insurance by Ben Jack Cage through his controlled companies, Coastal Salvage Company and Texas Lloyds, thereby leaving $40,000.00 worth of such

bonds as of December 31, 1951 in ICT Insurance. That in truth and in fact, as hereinbefore shown, the $40,000.00 worth of Debenture Bonds was not an admissible asset under the insurance laws and such Bonds were worthless.

(b) On page 30, under schedule N, "Showing All Bank Balances Carried in Each Bank or Trust Company on the Last Day of Each Month of the Current Year," and on page 2, it was stated that ICT Insurance had cash on deposit in the Mercantile Bank as of December 31, 1951, [fol. 82] free and unencumbered in the amount of $295,287.70 when, in truth and in fact, $60,000.00 of such amount was not free and unencumbered cash of ICT Insurance, but on the contrary, was earmarked for the repayment of the $60,000.00 personal loan of Ben Jack Cage at the Mercantile Bank as hereinabove alleged.

(c) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that as of December 31, 1951, ICT Insurance did not owe any amount for borrowed money, when in truth and in fact, the $60,000.00 loan transaction entered into on December 31, 1951, between Ben Jack Cage and the Mercantile Bank was in effect a loan to ICT Insurance with the understanding and agreement that the proceeds of such loan would be held by ICT Insurance and used to repay such loan after the year-end and with no right of ICT Insurance to use the proceeds from such loan during the interim for its free and unrestricted use in paying obligations to its policyholders and claims under insurance policies and debts due other creditors.

(d) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that as of December 31, 1951, ICT Insurance did not owe any amount for borrowed money when, in truth and in fact, the $150,000.00 loan transaction entered into on December 31, 1951, by and between Ben Jack Cage and the Mercantile Bank was in effect a loan to ICT Insurance as hereinbefore alleged.

(e) On page 22, under schedule D—part 2, "Stocks Owned," and on page 2, it was stated that ICT Insurance owned as an asset 400 shares of Cliff Towers Company

Hotel stock, at a value of $40,000.00, when in truth and in fact, as hereinbefore shown, such stock was not worth such value.

(f) On page 22, under schedule D—part 2, "Stocks Owned," and on page 2, it was stated that ICT Insurance owned 3,718 shares of the capital stock of ICT Life at a value of $86,996.35, when in truth and in fact, such stock [fol. 88] was not an admissible asset and was not worth such value.

(g) On page 3, "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had only a total liability of $1,097,075.10, when in truth and in fact, such liability was $316,016.28 greater, by virtue of the false and fictitious reinsurance treaty entered into with Narragansett Insurance Company for the sole purpose of decreasing the net liabilities by this amount of $316,016.28 for statement purposes.

(h) On page 3, "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a capital of $400,000.00 and unassigned funds or surplus in the amount of $301,295.86, or a surplus as regards policyholders in the total amount of $701,292.86, when in truth and in fact, ICT Insurance had no capital and no surplus and was hopelessly insolvent.

71.

During the year 1951, and at the time the December 31, 1951 annual statement of ICT Insurance was prepared, and at the time said statement was submitted to the Board of Insurance Commissioners, the following defendants were officers and/or directors and/or trustees of ICT: Nile E. Ball, Ben Jack Cage, John G. Vaughan, William J. Harris, Freeman Everett, Kenneth Mabry, M. M. McKnight, J. A. McMahon, Jr., Paul C. Sparks, William A. Cullen, W. S. East, Eddie Gross, Fred Lucas, W. C. McMasters, C. R. Saunders, L. A. Townsend, Walter Wideman, Ray Johnson, Bill Sams, George Webber, T. W. Wheeler, Stanley E. Prichard, Marshall F. Bivens, L. W. Kellogg, Garth W. Daniel, O. Z. Gulledge, Ross W. Kennedy, C. C. Hill, Char-

lotte Morgan Graham, W. A. Combs, William V. Barker and Albert Boggess. At the time that these false, fraudulent, and fictitious financial transactions were entered into, and at the time that the false statements were made in the annual statement, and at the time that such annual statement was submitted to the Board of Insurance Commis-
[fol. 84] sioners, each of these defendants either participated in such fraudulent transactions and/or knew and/or were charged with knowledge of the fraudulent aspects of such financial transactions and that some or all of such statements were false, or as officers and/or directors, they negligently and carelessly permitted such fraudulent and fictitious transactions to be entered into and such false statements to be made and submitted to the Board, when with ordinary care in exercising their duties as officers or directors, they could have, and should have known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made, with the intent that the same should be submitted to the Board of Insurance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a Certificate, certifying that ICT Insurance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1952. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a certificate of such compliance would be circulated as required by law and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders, and stock subscribers that ICT Insurance had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and these classes of persons, and was a breach of such officers' and directors' fiduciary duty to ICT Insurance, and were a part of and in furtherance of and in aid of the conspiracy; that by the hereinabove alleged acts of the persons and entities, hereinabove-named, other than such officers and directors in entering into, aiding, participating, and join-

ing in the fraudulent acts hereinabove alleged which were [fol. 85] entered into to fictitiously increase ICT Insurance Company's assets and fictitiously lower its liabilities, such persons joined in, aided, and abetted the officers and directors in the making of such false and fraudulent December 31, 1951 annual statement of ICT Insurance, and thereby aided and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance; all of which acts were a part of and in furtherance of and in aid of the conspiracy. The false statements in ICT Insurance Company's annual statement and submitted by its officers to the Board were statements made directly to the Board, were statements made as to material facts and was, and were relied upon by said Board as the truth, and did cause the Board to issue a renewal certificate of authority to ICT Insurance to continue to do business in 1952, together with a Certificate of Publication which was published in two newspapers of wide circulation as required by law.

72.

To further the conspiracy, some time during the year 1952, at an exact date well known to the defendants, a Financial Statement of Condition of ICT Insurance in pamphlet form was prepared and widely distributed to the existing and prospective creditors, claimants, insurance agents, policyholders, and stockholders of ICT Insurance. On one side of the pamphlet was a financial statement, showing ICT Insurance Company's assets and liabilities as of December 31, 1951, the same as shown on pages 2 and 3 of ICT Insurance Company's December 31, 1951, annual statement, and showing a capital of $400,000.00, surplus of $301,295.86, or a combined policyholder surplus of $701,295.86. The assets and liabilities used to make up such pamphlet statement to show such capital and surplus were false for the same reasons as hereinbefore shown, that they were false as shown in the December 31, 1951, annual statement of ICT Insurance. On the other side of the financial pamphlet, was a statement the company was owned by members of the American Federation of Labor and listed [fol. 86] the names of the officers and directors of ICT Insurance Company.

73.

At the time that these financial pamphlets were made and published, each of the defendants who as hereinbefore alleged were officers and directors, knew that the statements were false, or as officers and/or directors, they negligently and carelessly permitted such false statements to be made and published, when with ordinary care in exercising their duties as officers and/or directors, they could have, and should have, known the true facts. These defendants made and published, caused to be made and published, or negligently permitted to be made and published, the statement with their names thereon with the purpose and intent that such statement be relied upon by existing and prospective innocent policyholders, creditors, and stockholders to induce them to invest in ICT Insurance and to extend to ICT Insurance credit. These false representations were made as to material facts and were relied upon by the classes of persons to whom they were made; such wrongful acts were wrongs as against ICT Insurance and its claimants, creditors, stockholders and policyholders, by reason of the fact that pursuant to such wrongful acts, ICT Insurance was caused to incur liabilities and obligations that it could not meet. Such wrongful acts by such officers and directors was a breach of their fiduciary duty to ICT Insurance. All of such fraudulent acts of such defendants aided, abetted, and furthered the conspiracy and became a part thereof. Likewise, all the defendants, other than officers and directors, as hereinabove alleged who participated in the false and fraudulent financial manipulations in aid of the creation of the fictitious assets and concealment of liabilities, through the acts as hereinabove alleged, aided such officers and directors in the breach of their fiduciary duty in connection with the publication and issuance of such false financial pamphlets; all of which fraud-
[fol. 87] ulent acts of such defendants aided, abetted, and furthered the conspiracy and became a part thereof.

74.

The Board of Insurance Commissioners of the State of Texas made an examination of ICT Insurance as of Decem-

ber 31, 1951, through its Examiner, F. E. MacCurdy. In such examination, such examiner, on page 14 of such report stated that ICT Insurance had a paid-up capital of $400,000.00, surplus in the amount of $146,824.15, and surplus as regards policyholders in the amount of $546,824.15. That in arriving at such capital and surplus, such examiner listed in such examination report the Coastal Development Company Debenture Bonds as an admissible asset at the value of $40,000.00; listed in such report the 400 shares of Cliff Towers Hotel Company preferred stock as an admissible asset at the value of $40,000.00; listed in such report the 3,718 shares of the ICT Life stock at a value of $86,996.35; gave effect to the fictitious reinsurance treaty as between ICT Insurance and Narragansett and thereby gave ICT Insurance additional surplus in such examination report in the amount of approximately $316,016.28 as of December 31, 1951; allowed as a free and unencumbered asset, cash in the amount of $295,287.70, when $60,000.00 of such amount was not free and unencumbered cash in ICT Insurance; but on the contrary, was earmarked for the repayment of the December 31, 1951, $60,000.00 loan at the Mercantile Bank as hereinbefore shown.

75.

Attached to such report of Examiner F. E. MacCurdy in which the above statements were made and the above transactions were given effect to was an affidavit sworn to by F. E. MacCurdy on the 18th day of July 1952 stating: "That the statements, exhibits and data therein contained are true and correct to the best of his knowledge and belief." [fol. 88] Contrary to such affidavit as hereinbefore shown, such examination report was false and misleading. At the time that Examiner F. E. MacCurdy made his examination, his report, and his affidavit, he either knew that such statements were false, or by the exercise of any reasonable amount of diligence, he could have determined that they were false.

76.

In connection with such examination, on February 12, 1952, Examiner F. E. MacCurdy sent to the Mercantile

Bank a bank verification form in order to verify the cash assets that ICT Insurance had on deposit in the Mercantile Bank on December 31, 1951, the effective date of such examination. On February 14, 1952, the Mercantile Bank, acting through W. R. Rainey, its assistant auditor, issued the following certificate to the Board of Insurance Commissioners of the State of Texas:

"STATE OF TEXAS
DEPARTMENT OF INSURANCE

Examination of
The Insurance Company of Texas
For the
Department of Insurance
State of Texas

Dallas, Texas February 12, 1952

Mercantile National Bank
Dallas, Texas

Gentlemen:

Among the assets of the Insurance Company of Texas on December 31, 1951, is a deposit in your institution. For the sole purpose of verifying the books, will you please fill out the attached certificate and return it in the enclosed stamped envelope?

Very respectfully yours,

/s/ F. E. MacCurdy, Examiner

This is to certify that at the close of business December 31, 1951, the books of the MERCANTILE NATIONAL BANK AT DALLAS showed a balance of OVER due said insurance company and subject to its check and with- [fol. 89] drawal; there were also certificates of deposits outstanding for NONE due, with interest due from at the rate of per cent.

On the same date the said insurance company was not indebted either directly or contingently to this institution for borrowed money, discounted notes or under any form of agreement, nor are any of the afore-

mentioned deposits held by this institution as security for any loan made to an officer, director or employee of said insurance company, except: NONE

MERCANTILE NATIONAL BANK AT DALLAS

/s/ "By W. R. Rainey, Assistant Auditor"

On the reverse side of such certificate, it was shown that ICT Insurance had in its regular checking account $298,786.71, that ICT Insurance had in its capital stock account $370.00, and had in its special account $363.05. This certificate of the Mercantile Bank issued to the Board of Insurance Commissioners stating "on the same date said insurance company was not indebted either directly or contingently to this institution for borrowed money, discounted notes or under any form of agreement" was false for the reason that as hereinbefore alleged, as of December 31, 1951, ICT Insurance was indebted either directly or contingently to the Mercantile Bank for borrowed money, or under an agreement, by reason of the fact as hereinbefore alleged, in connection with the $150,000.00 loan by the Mercantile Bank for the capital increase of ICT Insurance, ICT Insurance Company's assets were pledged with the bank to secure such loan, and furthermore, it was agreed that such loan would be paid out of assets of ICT Insurance in the form of collections on stock subscriptions of ICT Insurance. That furthermore, as hereinbefore alleged, under the circumstances and conditions in which such loan was obtained by Ben Jack Cage as agent for ICT Insurance and as president of ICT Insurance, such loan was in effect a loan to ICT Insurance. That furthermore, as hereinbefore alleged, as of December 31, 1951, contrary to such verification of the Mercantile Bank, ICT Insurance was indebted either directly or contingently to the Mercantile [fol. 90] Bank for borrowed money or under an agreement or a part of such deposits were held by the Mercantile Bank as security for a loan made to an officer, director, or employee of ICT Insurance, for the reason that in connection with the $60,000.00 over the year-end temporary loan transaction involving the Cliff Towers Hotel Company stock, it

was agreed as between the Mercantile Bank and Ben Jack Cage as president of ICT Insurance, that the $60,000.00 proceeds of such loan would be placed in ICT Insurance and that after the year-end such $60,000.00 would be used to repay such loan through the alleged repurchase of the Cliff Towers Hotel Company stock. The Mercantile Bank knew at the time that this certificate was made, that such statement was false. The Mercantile Bank knew and was charged with knowledge that these loans would be used to increase the cash assets shown in ICT Insurance Company's records, books and the 1951 annual statement of ICT Insurance in order to enable ICT Insurance to obtain a renewal of its Certificate of Authority in order to continue to do business. The Mercantile Bank further knew and was charged with knowledge that such bank verification statement would be used as a basis for the examiner to show in his examination report that ICT Insurance had such cash assets in such amounts of $150,000.00 and $60,000.00, free and unencumbered, and would thereby aid in showing ICT Insurance in an alleged solvent financial condition. The Mercantile Bank knew and was further charged with knowledge that such bank verification of the bank stating that ICT Insurance had such amounts of cash in its regular checking account, free and unencumbered, such statement would aid in showing ICT Insurance in a solvent financial condition in such examination report and that based upon such examination report, ICT Insurance would be permitted to continue to do business. The Mercantile Bank further knew and was charged with knowledge that based upon such false examination report, the officers and directors of ICT Insurance would represent to the existing claimants, creditors [fol. 91] and policyholders and the public that ICT Insurance was in a solvent financial condition to induce them to continue to hold and purchase the worthless insurance policies and stocks of ICT Insurance and to extend to ICT credit. The Mercantile Bank knew that such represented financial condition of ICT Insurance verified by its own certificate, was false. The Mercantile Bank certificate was clearly a falsehood and in its fraudulent actions in arranging such loans and falsifying such certificates, the Mercantile Bank joined, aided, and abetted in making such false ex-

amination report; all of which acts constituted a part of the existing conspiracy, and furthered, aided, and abetted the same.

77.

In the alternative, the Receiver alleges that by such fraudulent acts of the Mercantile Bank in joining and aiding the officers and/or directors of ICT Insurance as hereinbefore alleged in falsely representing in ICT Insurance Company's annual statement as of December 31, 1951, and examination as of December 31, 1951, and the $60,000.00 and $150,000.00 were the free and unencumbered assets of ICT Insurance, the Mercantile Bank is estopped from contending otherwise, and therefore, when the Mercantile Bank accepted the $60,000.00 and $150,000.00 of ICT Insurance Company's cash assets in the repayment of such loans, such acts of the Mercantile Bank constituted a conversion and misappropriation of such cash assets of ICT Insurance in such amounts of $60,000.00 and $150,000.00, for which amounts the Receiver herein seeks to recover from the Mercantile Bank on behalf of ICT Insurance and its claimants, creditors, policyholders and stockholders.

78.

During the year 1952, ICT Insurance Company was caused to continue to issue its policies of insurance, enter into reinsurance transactions, continue to sell stock, and thereby caused to incur millions of dollars of liabilities which it could not meet when all during such time ICT In- [fol. 92] surance was hopelessly insolvent. Therefore, in order to show in the records and books of ICT Insurance and in its annual statement a position of solvency, additional wrongful, illegal, false, and fraudulent transactions were entered into during the year 1952.

79.

As hereinbefore alleged, in November 1950, agreements were entered into whereby the Berry Group and Mills Group, owning the majority of the stock of Continental Fire and Casualty Insurance Corporation, entered into an

agreement with Ben Jack Cage, John P. Moran, and Arthur M. Brown, trustees and agents for La Comercial, and Stuart B. Hopps as buyers of such stock; that as hereinbefore shown, the cash assets of Continental Fire in the amount of $322,500.00 cash was used as the down payment on the purchase price of such stock. As hereinbefore further alleged, the first installment due and payable by the buyers to the sellers was to be paid on or about January 15, 1952. Of this payment made to the sellers, $110,000.00 in cash was put up by Continental Fire and was actually paid by ICT Insurance. This came about in the following manner: On November 16, 1951, Continental Fire issued Check #12410 for $30,000.00 to Narragansett, and on its books charged and showed that it paid this amount on a quota share reinsurance treaty that Continental Fire had in effect at that time with ICT Insurance. On the books of Continental Fire, it was shown that this amount was paid directly to Narragansett. On December 14, 1951, Continental Fire issued another check, #12564, in the amount of $20,000.00, to Narragansett, and on its books charged and showed that this was another payment on a quota share reinsurance treaty that it had in effect at the time with ICT Insurance. Again, the books of Continental Fire show that this payment was paid directly to Narragansett. On December 20, 1951, Continental Fire issued Check #12588 in the amount of $20,000.00 to Narragansett and [fols. 93] charged on its books and showed that this was a payment to ICT Insurance on the quota share reinsurance treaty that Continental Fire had in effect with ICT Insurance on that date. Again, the books of Continental Fire showed that this check was issued directly to Narragansett. Again, on December 26, 1951, Continental Fire issued its Check #12609 for $40,000.00, and this $40,000.00 was set up on the books of Continental Fire in the same manner. The total of these checks so disbursed by Continental Fire was $110,000.00 This $110,000.00 found its way into the possession of the buyers and was used on the January 15, 1952, payment to the sellers. As hereinbefore shown, by reason of the fact that ICT Insurance showed on its books that this $110,000.00 was paid to it on a reinsurance account due from Continental Fire when, in truth and

in fact, as hereinabove shown, the $110,000.00 was not paid to ICT Insurance but was actually paid to Narragansett and in turn paid over to the buyers, who in turn used such money to pay the sellers as a payment of the stock of Continental Fire on behalf of Stuart B. Hopps and La Comercial. Such transactions constituted a conversion, misappropriation, theft, and swindle of $110,000.00 of assets of ICT Insurance. Therefore, this transaction, coupled with the payment of the $322,500.00 down payment made in November 1950 in which as hereinbefore alleged $322,500.00 of ICT Insurance Company's assets were used, made a total of $432,500.00 of ICT Insurance Company's assets which was used by the buyers to purchase Continental Fire's stock for their own use and benefit, all of which was known by the sellers and their agents or representatives. The Receiver makes demand upon Ben Jack Cage, Stuart B. Hopps, John P. Moran, Arthur M. Brown, Joel H. Berry, John B. Mills, C. A. Mohrle, C. D. Mohrle, Federal Underwriters, a Texas Corporation, Cecil Mills and Richard Dean Hawn for the repayment of said amount of $432,-[fol. 94] 500.00, and for which amount the Receiver sues for to recover herein.

80.

In connection with the same 18,102.75 shares of Continental Fire stock, on January 1, 1952, an overall agreement was entered into, a part of such overall agreement being the sale of such stock to ICT Insurance for a total consideration to be paid by ICT Insurance in the amount of $718,401.20. There were additional agreements entered into under such overall agreement on the same date, as between ICT Insurance, Narragansett, La Comercial and Continental Fire concerning reinsurance as hereinafter more specifically alleged.

81.

In connection with the sale of such Continental Fire stock to ICT Insurance by Francis J. Knoll, J. P. Moran and Arthur M. Brown, trustees for La Comercial, and Stuart B. Hopps, it was agreed that as consideration for

the 18,102.75 shares, ICT Insurance would pay to La Comercial and Stuart B. Hopps, a total consideration of approximately $718,401.20; such consideration to be paid by ICT Insurance issuing its surplus notes to La Comercial in the total amount of $586,091.82 and by assuming the $132,309.38 that was still owing and due to the original sellers, being the Berry and Mills Groups.

82.

At the time that Ben Jack Cage, Francis J. Knoll, Frank G. Newman, Stuart B. Hopps, John P. Moran and Arthur M. Brown engineered ICT Insurance into such agreement, Continental Fire was hopelessly insolvent and the 18,102.75 shares of stock of Continental Fire were worthless. As hereinbefore alleged in connection with such agreement whereby ICT Insurance was caused to purchase such stock of Continental Fire, there were entered into reinsurance treaties on the same date, as a part of such overall agreement. In one of such reinsurance agreements, La Comercial [fol. 95] ceded to Continental Fire effective January 1, 1952, 100 per cent of its United States insurance business with an unearned premium reserve of $250,000.00, thus making due under such treaty to Continental Fire from La Comercial the amount of $125,000.00 as stated in such agreement.

83.

In one of such treaties, Narragansett ceded to Continental Fire effective January 1, 1952, 100 per cent of all of its business with an unearned premium reserve of $2,062,678.89, making an amount due and owing as of January 1, 1952, from Narragansett to Continental Fire, the amount of $1,031,339.45, as stated in such agreement.

84.

In another of such agreements, Continental Fire ceded to ICT Insurance effective January 1, 1952, 100 per cent of all of its business, which included that assumed from Narragansett and La Comercial in the treaties hereinabove mentioned, which had an unearned premium reserve of

$2,698,463.07, thus making an amount due and payable by Continental Fire to ICT Insurance on such date, January 1, 1952, the amount of $1,349,231.53 as stated in such agreement.

85.

These treaties hereinabove set forth were portfolio reinsurance treaties, whereby the business as of that date was ceded under such treaties was actually taken over by the assuming companies under such treaties and which assuming companies took the place of the ceding company and substituted itself for such ceding company in all respects. On the same date, January 1, 1952, and in connection with and as a part of such Overall Agreement, ICT Insurance turned around and entered into a bankers type quota share reinsurance treaty with Narragansett, whereby ICT Insurance allegedly ceded to Narragansett 75 per cent of all [fol. 96] of its business which included the direct writings of ICT Insurance as well as all of the business that it assumed from Continental Fire on such date, which included all of Continental Fire's business as well as the business that Continental Fire had assumed from Narragansett and La Comercial under the above treaties. The bankers type treaty between Narragansett and ICT Insurance was entered into for the sole purpose of giving ICT Insurance surplus relief and to fraudulently show a position of solvency. Through such false and fraudulent bankers type treaty, ICT Insurance obtained a reduction of its liabilities in the net amount of $1,143,992.72 as of January 1, 1952.

86.

As hereinbefore alleged, under the reinsurance treaty between Narragansett and Continental Fire on January 1, 1952, Narragansett owed Continental Fire $1,031,399.44. Likewise, as hereinbefore alleged, under the reinsurance treaty between Continental Fire and La Comercial, La Comercial owed Continental Fire $125,000.00; therefore, by virtue of such transactions, Continental Fire had a receivable from Narragansett and La Comercial in the total amount of $1,156,399.44. Further, as hereinbefore alleged, under the reinsurance treaty between Continental Fire and

ICT Insurance, Continental Fire owed to ICT Insurance on January 1, 1952, the amount of $1,349,231.53. At the time that the agreement was entered into, these defendants knew that Narragansett and La Comercial were in no position, and did not have sufficient assets to pay to Continental Fire the amount of $1,156,399.44 that was due and owing to Continental Fire by virtue of such reinsurance transactions. Therefore, since Narragansett and La Comercial did not have sufficient assets to pay such amount to Continental Fire, Continental Fire was without sufficient assets to pay to ICT Insurance the amount of $1,349,231.53 that Continental Fire owed to ICT Insurance under the reinsurance treaty as between ICT Insurance and Continental Fire hereinabove alleged. Therefore, by reason of the fact [fol. 97] that as of January 1, 1952, the receivable that Continental Fire had from Narragansett and La Comercial in the amount of $1,156,399.44 was not collectible, Continental Fire had no capital, had no surplus, and had an additional deficit of approximately $654,870.78.

87.

By reason of the inability of Narragansett and La Comercial to pay Continental Fire the $1,156,399.44 and the inability of La Comercial and Narragansett to pay to Continental Fire and ICT Insurance net balances due on these and other reinsurance transactions, as of June 30, 1952, Continental Fire was merged with ICT Insurance, thereby wiping out the balances due and owing as between Continental Fire and ICT Insurance on the January 1, 1952 reinsurance treaty agreement between such companies and thereby making it possible to enter into a settlement agreement as between La Comercial and Narragansett on the one hand, and ICT Insurance on the other. Such settlement agreement was entered into on the 13th day of August 1952, and in which settlement agreement the reinsurance treaties heretofore alleged, as well as other reinsurance treaties as between ICT Insurance, Narragansett and La Comercial were cancelled, and in which agreement it was stated that the amounts due as between all of such companies was determined and final settlement had been arrived at. The net amount of the settlement of all of the bal-

ances as between such companies resulted in a net amount payable by Narragansett to ICT Insurance in the amount of $1,720,681.43.

88.

In such settlement agreement, it was agreed that ICT Insurance would accept in payment of the $1,720,681.43 due from Narragansett and La Comercial the following assets and their approximate value:

(a) Surplus Notes of ICT Insurance in the amount of $586,091.82 executed to La Comercial in connection with [fol. 98] the purchase of Continental Fire stock from Stuart B. Hopps and the trustees for La Comercial as hereinbefore alleged;

(b) Stock of La Comercial in the amount of $560,000.00.

(c) Two promissory notes of ICT Insurance totalling $80,624.00 which has been issued to Narragansett Insurance Company in connection with the reinsurance and overall agreement of January 1, 1952.

(d) Stock of Narragansett Insurance in the amount of $302,281.00.

(e) Other various and sundry accounts resulting from transactions between Leadenhall Corporation, ICT Insurance, Continental Union, Narragansett Insurance Company, JACCO of Alabama, La Comercial and other Hopps and Cage-controlled entities, all of which accounts made up the remaining balance on the $1,720,681.43.

All of such securities were non-admissible as assets that could be carried by ICT Insurance and were worthless.

89.

Through such actions of Ben Jack Cage, Stuart B. Hopps, Francis J. Knoll, Arthur M. Brown, Frank G. Newman, John P. Moran, La Comercial and Narragansett, the assets of ICT Insurance were used in connection with the purchase of Continental Fire stock by La Comercial and Stuart B. Hopps from the Mills and Berry Groups as hereinbefore alleged; that further, by the fraudulent acts

of these defendants as herein alleged, on January 1, 1952, ICT Insurance was caused to purchase such stock of Continental Fire from La Comercial and Stuart B. Hopps at a consideration of $718,401.20, when at the time, by virtue of the receivable of over a million dollars of Continental Fire from Narragansett and La Comercial which was worthless as hereinbefore alleged, Continental Fire was hopelessly insolvent and such stock was worthless; that further- [fol. 99] more, through such acts of these defendants, ICT Insurance was forced to take over all of the business of Narragansett, all of the state-side business of La Comercial, and all of the business of Continental Fire, amounting to millions of dollars of potential liabilities, and for taking over all of such insurance business, ICT Insurance was forced to accept in payment therefor, the worthless assets as hereinbefore alleged; that furthermore, a great amount of such business that ICT Insurance was forced to take over from Narragansett and La Comercial in such transactions was substandard business and risks that an insurance company in the ordinary course of business would not take over; that furthermore, through the acts of such defendants in entering into the bankers type reinsurance treaty on January 1, 1952, between ICT Insurance and Narragansett, the liabilities of ICT Insurance through such subterfuge was reduced over a million dollars as hereinbefore alleged. By such acts of such defendants aiding in falsifying ICT Insurance Company's records, books and annual statement, they converted, misappropriated, embezzeled, dissipated and wasted assets of ICT Insurance, all of which acts furthered, aided and abetted the conspiracy to keep ICT Insurance operating in violation of law when ICT Insurance was hopelessly insolvent.

90.

As hereinbefore alleged, in connection with the settlement agreement as between ICT Insurance, Narragansett and La Comercial, the bankers type treaty between ICT Insurance and Narragansett whereby ICT Insurance supposedly ceded the 75 per cent of its business to Narragansett, was cancelled effective August 31, 1952. Therefore, since such bankers type treaty with Narragansett was be-

ing cancelled as of August 31, 1952, it was necessary in order to continue to show a false solvent condition in ICT Insurance to devise and enter into other schemes to obtain other fictitious reinsurance, and through such means, to [fol. 100] attempt to reduce the liabilities of ICT Insurance. By virtue of the fact that through the reinsurance agreements entered into on January 1, 1952, by which ICT Insurance assumed all the business of Continental Fire and Narragansett and all the state-side business of La Comercial, ICT Insurance Company's liabilities for unearned premium reserve and loss reserve had been increased by millions of dollars; that furthermore, by virtue of the fact that for taking over such business ICT Insurance did not receive assets in the settlement agreement that were admissible assets or that were worth any value, ICT Insurance was far short of the necessary assets to back up the reserves and losses of all such business assumed and was in a hopelessly insolvent condition. In June 1952, when the negotiations were begun for the cancellation of the Narragansett bankers type treaty, other negotiations were begun by Ben Jack Cage, Francis J. Knoll and Stuart B. Hopps on the one hand; and Lloyds of London, The Orion Insurance Company, Ltd., London, England; Seven Provinces Insurance Company, Ltd., The Hague, Holland; Andrew Weir Insurance Company, Ltd., London, England; Steadfast Insurance Company, Ltd., Victoria, Australia; English and American Insurance Company, Ltd., London, England and their representatives, agents and brokers; John C. Paige and Company, Boston, Massachusetts; C. E. Heath and Company, Ltd., London, England; Harvey Trinder and Van Ommeren, Ltd., London, England; and Mendes and Mount, Attorneys at Law, New York, New York, for the placing of a bankers type reinsurance treaty as between ICT Insurance and Lloyds of London and the other companies hereinbefore mentioned through Confinental Union Insurance Company, a new corporation to be organized under the Alabama laws.

91.

Under the Insurance Code of Texas, before a domestic company organized under the Texas laws can take full

credit in their unearned premium reserve and loss reserve on a quota share reinsurance treaty, the assuming [fol. 101] company must be admitted to do business in Texas; that under such laws, Lloyds of London was not recognized as a qualified, admitted company to enter into quota share treaties with Texas companies; and therefore, in a quota share treaty as between ICT Insurance and Lloyds of London, ICT Insurance could not take full credit in its unearned premium reserve and loss reserve on business ceded to Lloyds of London under a quota share treaty.

92.

Therefore, in order to circumvent such laws of Texas, a scheme was entered into to organize Continental Union under the Alabama laws, under which laws an insurance company is permitted to take full credit in its unearned premium reserve and loss reserve on quota share reinsurance treaties with Lloyds of London; that after Continental Union was organized, it was a further scheme and plan for ICT Insurance to enter into a bankers type quota share reinsurance agreement with Lloyds of London by running such treaty through Continental Union and thereby using Continental Union as a foil in order to circumvent the laws of Texas.

93.

Such scheme and plan was carried out in the following manner: That on or about August 13, 1952, the Charter of Continental Union Insurance Company was obtained, the home office of such company being designated as Montgomery, Alabama, and later changed by charter amendment to Birmingham, Alabama; that in connection with the organization of Continental Union, Ben Jack Cage, John G. Vaughan and Nile E. Ball organized Jack Cage and Company, Inc., an Alabama Corporation, whose principal officers and directors were Ben Jack Cage, Nile E. Ball, John G. Vaughan and Francis J. Knoll; then, by the use of such private corporation, Jack Cage and Company, Inc., (Alabama), hereinafter referred to as JACCO of Ala- [fol. 102] bama, Continental Union was organized. The

original incorporators of Continental Union were JACCO of Alabama who was issued 19,997 shares of the original 20,000 shares of Continental Union, Ben Jack Cage who was issued one share, John G. Vaughan who was issued one share, and Nile E. Ball who was issued one share.

94.

After the incorporation of Continental Union and effective as of August 22, 1952, a bankers type reinsurance treaty was entered into as between ICT Insurance and Continental Union, whereby ICT Insurance supposedly ceded to Continental Union 75 per cent of its unearned premium reserve and 75 per cent of its losses occurring after the effective date of such treaty. Simultaneously with, and as a part of such reinsurance agreement as between Continental Union and ICT Insurance, 100 per cent of the business assumed by Continental Union under the treaty as between Continental Union and ICT Insurance was ceded to Lloyds of London. The Orion Insurance Company, Ltd., London, England; Seven Provinces Insurance Company, Ltd., The Hague, Holland; Andrew Weir Insurance Company, Ltd., London, England; Steadfast Insurance Company, Ltd., Victoria, Australia and English and American Insurance Company, Ltd., London, England. That in connection with the retrocession by which Continental Union supposedly retroceded the business that it had simultaneously assumed from ICT Insurance to Lloyds of London, The Orion Insurance Co., Ltd., London, England; Seven Provinces Insurance Co., Ltd., The Hague, Holland; Andrew Weir Insurance Co., Ltd., London, England; Steadfast Insurance Co., Ltd., Victoria, Australia; English and American Insurance Co., Ltd., London, England an agreement was entered into simultaneously and as a part of such transactions as between ICT Insurance and Lloyds of London and such other Insurance Companies, whereby ICT Insurance guaranteed any monies due in the treaty as between Continental Union, Lloyds of London and such other insurance [fol. 103] companies, and further, as between ICT Insurance, Lloyds of London and such other insurance companies, it was understood and agreed that all matters pertaining to such treaties shall be dealt with directly

with ICT Insurance who would be considered as the principal party to such agreements.

95.

As hereinbefore alleged, the so-called quota share treaty as between ICT Insurance and Continental Union and the so-called quota share treaty whereby such business was retroceded by Continental Union on to Lloyds of London and such other insurance companies were bankers type treaties; that as hereinbefore shown, such treaties were not ordinary type of quota share treaties whereby the reinsurer for an agreed commission agrees to share in the losses occurring on the business assumed; such treaties were entered into for the sole and only purpose as a subterfuge in order to reduce the net liabilities of ICT Insurance and thereby give ICT Insurance surplus relief and thereby aid in painting a false picture of solvency of ICT Insurance.

96.

That at the time that such transactions were entered into, Ben Jack Cage, Stuart B. Hopps, Francis J. Knoll, Nile E. Ball, John G. Vaughan, Lloyds of London, The Orion Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Andrew Weir Insurance Company, Ltd., Steadfast Insurance Company, Ltd., English and American Insurance Company, Ltd., and their representatives, agents and brokers; John C. Paige and Company, Boston, Massachusetts; C. E. Heath and Company, Ltd.; Harvey Trinder and Van Ommeren, Ltd.; and Mendes and Mount, Attorneys at Law, knew and were charged with knowledge that under the laws of Texas, ICT Insurance would not be permitted to take full credit for its unearned premium reserve and loss reserve in a quota share reinsurance treaty with Lloyds [fol. 104] of London and such other foreign insurance companies, they knew and were charged with knowledge that Lloyds of London and such other insurance companies were not admitted to do business in Texas; they knew that the sole and only purpose for the organization of Continental Union was in order to handle a bankers type reinsurance treaty between ICT Insurance and Lloyds of London

through Continental Union as a foil, in order to circumvent the insurance laws of Texas; they knew and are charged with knowledge that the bankers type reinsurance agreements entered into were not entered into for the purpose of giving any protection to the claimants and policyholders of ICT Insurance, but were entered into for the sole purpose of reducing ICT Insurance Company's liability and thereby give ICT Insurance surplus relief. Through such fraudulent acts, Ben Jack Cage, Francis J. Knoll, Nile E. Ball, and John G. Vaughan, as officers and/or directors, breached their fiduciary duty to ICT Insurance and Stuart B. Hopps, Lloyds of London, The Orion Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Andrew Weir Insurance Company, Ltd., Steadfast Insurance Company, Ltd., English and American Insurance Company, Ltd., John C. Paige and Company, C. E. Heath and Company, Ltd., Harvey Trinder and Van Ommeren, Ltd., and Mendes and Mount, joined, aided, and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance. By virtue of such defendants' participation in such transactions and the parts each therein played, such defendants aided, abetted and furthered the conspiracy of keeping ICT Insurance operating in violation of law. Furthermore, ICT Insurance was caused to pay to Lloyds of London and the other foreign companies herein named, the total sum of $178,051.34, under such false and fictitious reinsurance treaties, which expenditure of funds constituted a conversion, misappropriation, theft, and swindle of such funds of ICT Insurance by all of the defendants above-named in this paragraph.

[fol. 105]

97.

In ICT Insurance Company's annual statement as of December 31, 1952, which was filed with the Board of Insurance Commissioners in the year 1953, and through the Examination Report as of June 30, 1952, and through other information submitted to the Board of Insurance Commissioners, Garland A. Smith, member of the Board of Insurance Commissioners, was informed and knew of such

false and fictitious reinsurance treaty; knew that such treaty as between ICT Insurance and Lloyds of London and such other companies using Continental Union as a foil was entered into to evade and circumvent the laws of the State of Texas; knew that under such subterfuge, ICT Insurance was caused to take full credit in its books and annual statement as of December 31, 1952, on the business ceded under such treaty and knew that through the taking of such credit, ICT Insurance was caused to show that ICT Insurance was in a solvent financial condition, when in truth and in fact, Garland A. Smith knew that ICT Insurance was insolvent and that the whole transaction was a subterfuge in violation of the insurance laws; which laws, Garland A. Smith as a public official and as a member of the Board of Insurance Commissioners had taken a sworn oath to enforce and uphold on behalf of the State of Texas, the public, ICT Insurance and its claimants, creditors, stockholders and policyholders. That to induce Garland A. Smith to violate his sworn oath of office as a public official and permit ICT Insurance to take full credit under such false and fraudulent reinsurance treaty and to approve ICT Insurance Company's false annual statement as of December 31, 1952, and to permit ICT Insurance to continue to operate in violation of law although ICT Insurance was hopelessly insolvent, Ben Jack Cage bribed Garland A. Smith by the means of paying Garland A. Smith, $700.00 per month through his son-in-[fol. 106] law, Max Wayne Rychlik, such bribe of $700.00 per month began in November 1953 and continued until December 1955, which payments totalled $18,200.00. That in addition to such cash payments, Garland A. Smith was given presents by Ben Jack Cage, including an air-conditioner for his car at the value of $348.00 and was also entertained lavishly by Ben Jack Cage and was given free airplane trips, all at the expense of ICT Insurance; that at the time such monies and other gifts were accepted by Garland A. Smith he well knew that Art. 1.17 of the Texas Insurance Code prohibited him from directly or indirectly accepting from any insurance company any pay, compensation or gratuity; that by reason of such bribes accepted by Garland A. Smith, the said Garland A. Smith

not only violated his sworn oath of office in the transaction hereinabove alleged, but likewise violated his sworn oath of office in other transactions as hereinafter further alleged; that by virtue of such fraudulent and dishonest conduct, Garland A. Smith embraced the conspiracy and joined, aided, abetted, and furthered such conspiracy in keeping ICT Insurance operating in violation of law when ICT Insurance was hopelessly insolvent; that further, the acceptance of the bribes hereinabove set forth constituted a conversion, misappropriation, theft, and swindle by Ben Jack Cage, Garland A. Smith, and Max Wayne Rychlik of assets of ICT Insurance in the amount of such bribes for which amount the Receiver herein likewise sues to recover.

98.

As hereinbefore alleged, in the settlement agreement in August 1952 as between ICT Insurance on the one hand, and Narragansett and La Comercial on the other, $1,720,681.43 of non-admissible and/or worthless securities, was supposedly paid to ICT Insurance by Narragansett and La Comercial, in settlement of the net balance due ICT Insurance in the amount of $1,720,681.43, which arose by virtue of the reinsurance transactions as hereinbefore al- [fol. 107] leged. Since these assets were worthless and/or non-admissible assets, ICT Insurance could not carry these assets as admissible in its books and statements. Therefore, in order to hide such worthless assets and at the same time derive the benefit of such assets for statement purposes, upon the entry of the so-called quota share reinsurance treaty between ICT Insurance and Lloyds of London and such other insurance companies using Continental Union as a foil, ICT Insurance showed on its books that these assets had been paid to Continental Union on such reinsurance treaty; however, since such assets were not admissible assets and were worthless at the time that ICT Insurance made such entry in its books in August 1952 showing that it had paid such assets to Continental Union, Continental Union likewise could not carry such assets, and such assets for such reason were never in fact transferred to Continental Union but were transferred to or handed over to Leadenhall Corporation and supposedly

held by such corporation for the benefit of ICT Insurance. Leadenhall Corporation was a Delaware corporation which was controlled by Stuart B. Hopps, but which was, in connection with such settlement agreement, handed over to Ben Jack Cage and his Associates, and through such subterfuge, enabled ICT Insurance to show in its books and its December 31, 1952 annual statement, an admissible asset of $1,720,681.43 by virtue of reducing a reinsurance balance payable to Continental Union, thereby increasing its surplus in that amount, when in truth and in fact, the assets in such amount were never transferred to Continental Union nor shown on Continental Union's books as a payment on such account until June 30, 1953, which transaction will be hereinafter more fully described.

99.

As hereinbefore alleged, in December 1951, the capital of ICT Insurance was increased to $400,000.00 represented [fol. 108] by 40,000 shares of stock at a par value of $10.00 per share. Subsequent to such Charter Amendment, JACCO of Texas as agent for ICT Insurance continued to sell stock of ICT Insurance to unions, union members, and to the public. Such stock was sold outright and also through stock subscriptions without regard as to whether or not ICT Insurance at the time that such stock was sold had sufficient authorized and issued stock to fulfill such outright sales and sales on installment basis. In February 1952, Jack Cage and Company of Texas was selling and had sold approximately 20,000 shares of stock of ICT Insurance for $22.00 per share on an installment basis and in order to fulfill such installment contracts, it was necessary to obtain a Charter increase of ICT Insurance in the amount of 20,000 shares in order that there would be available such shares to fill such installment contracts. On the 5th day of March 1952, an application was made to the Attorney General of the State of Texas for an Amendment to the Charter of ICT Insurance Company to increase the capital of ICT Insurance from $400,000.00 to $600,000.00, representing such capital increase of $200,000.00, represented by an additional 20,000 shares of the capital stock of ICT Insurance at $10.00 par value. Submitted with such application for such Charter Amendment was an affidavit

executed on February 29, 1952 by Ben Jack Cage and John G. Vaughan, which affidavit stated:

"Affidavit as to the Payment of Increase in Capital Stock of The Insurance Company of Texas

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Ben Jack Cage and J. G. Vaughan, known to me, each of whom having been duly sworn on his oath, states for himself that they, the said Ben Jack Cage and J. G. Vaughan, are President and Secretary, respectively, of The Insurance Company of Texas.

That they are the identical parties who executed the [fol. 109] Certificate of Amendment of the Articles of Incorporation of said corporation whereby its capital stock was increased so that as increased said capital stock amounts to $600,000.00 divided into 60,000 shares of common voting stock of a par value of $10.00 each.

That the increase in the amount of common stock of the said corporation amounts to $200,000.00 represented by 20,000 shares of common voting stock with a par value of $10.00 each, fully paid in cash and credited to the capital stock account of the said corporation.

/s/ Ben Jack Cage
/s/ J. G. Vaughan

Subscribed and sworn to, before me, by the said Ben Jack Cage and J. G. Vaughan on this the 29th day of February, 1952.

/s/ E. Wells, Notary Public
in and for Dallas County, Texas"

An affidavit was procured from Meyer J. Rachofsky, Vice President of the Mercantile Bank, which affidavit was sworn to on the 4th day of March 1952 and wherein Meyer

J. Rachofsky in his capacity as Vice President of the Mercantile Bank, swore the following:

"AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Meyer Rachofsky, who after being duly sworn on his oath, states that he is Vice President of the Mercantile National Bank of Dallas, Texas.

That The Insurance Company of Texas, a Texas Corporation, with principal office in Dallas, Texas, has on this date on deposit with the Mercantile National Bank of Dallas the sum of Two Hundred Thousand Dollars ($200,000.00) in a Special Account titled "Capital Stock Account," that said deposit is separate and apart from the general account of such corporation.

That there are no liens or attachments on said account and the entire sum of $200,000.00 is subject to the transfer or withdrawal by the proper recorded [fol.110] officers of the corporation.

/s/ Meyer Rachofsky

Subscribed and sworn to, before me, by the said Meyer Rachofsky on this 4th day of March 1952.

/s/ W. L. Edwiston
Notary Public in and for
Dallas County, Texas"

Also submitted in connection with such affidavit was a certificate certifying that at an alleged public stockholders' meeting of ICT Insurance held in the Directors' Room of the Mercantile Bank at Dallas, Texas, on the 26th day of January 1952, it was voted in favor of amending the Articles of Incorporation of ICT Insurance so as to increase the capital stock from $400,000.00 to $600,000.00 by issuing

20,000 additional shares of the common voting stock of ICT Insurance. Based upon such affidavit and in reliance upon the information contained in same, the Attorney General of the State of Texas, on the 5th day of March 1952, approved the Amendments to ICT Insurance Company's Articles of Incorporation, increasing its capital from $400,000.00 to $600,000.00 represented by an increase of 20,000 shares of stock.

100.

At the time that such affidavits and other instruments hereinabove set out were prepared, and at the time that they were submitted to the Attorney General for approval, and at the time that they were relied upon by the Attorney General in approving such amendment to the Articles of Incorporation of ICT Insurance, Ben Jack Cage, John G. Vaughan, Nile E. Ball, and the Mercantile Bank knew that [fol. 111] the additional 20,000 shares of the increased capital stock of ICT Insurance had not been fully subscribed and paid for; they knew this by reason of the fact that such capital increase was effected in the following manner: On February 29, 1952, Ben Jack Cage, as president of JACCO of Texas, made an application at the Mercantile Bank with Meyer J. Rachofsky for a loan in the amount of $150,000.00; such loan to be made to JACCO of Texas and co-signed by Ben Jack Cage. The Mercantile Bank was advised that the purpose of the loan was to be used in connection with the increasing of the capital of ICT Insurance by $200,000.00, and its surplus by $200,000.00. The Bank was advised that Jack Cage and Company and/or Ben Jack Cage was selling 20,000 shares of stock for $22.00 per share to various individuals on an installment basis; that such installment payments were coming in at the rate of $100,000.00 per month; that after these installments were completed, the capital stock would be $600,000.00 and surplus would be $500,000.00, with a total capital of $1,100,000.00. It was understood and agreed that Ben Jack Cage would use the $150,000.00 proceeds from the loan, together with other monies that had been received in the sale of ICT Insurance Company's stock, which would

total $400,000.00, for the alleged purpose of purchasing from ICT Insurance the 20,000 shares of stock to be procured through the Charter Amendment and that such 20,000 shares of stock would be pledged as collateral to secure such personal loan of JACCO of Texas and/or Ben Jack Cage, and that the further proceeds received by JACCO of Texas and/or Ben Jack Cage on stock subscriptions already taken would be used to repay such loan.

[fol. 112] 101.

Pursuant to such loan application and agreement, on the 4th day of March 1952, the Mercantile Bank made the loan of $150,000.00 to JACCO of Texas and the proceeds from such loan were deposited in JACCO of Texas" account in the Mercantile Bank on the same date. Simultaneously therewith, and on the same date, JACCO of Texas issued its check, signed by Ben Jack Cage and John G. Vaughan to the Insurance Company of Texas Capital Stock Account in the amount of $150,000.00, which check, along with another check of JACCO of Texas was deposited in the Capital Stock Account of ICT Insurance in the Mercantile Bank, totaling $200,000.00. The check for $50,000.00 that was deposited along with the $150,000.00 check representing the proceeds from the loan, were monies that JACCO of Texas had received on the sale of such 20,000 shares of stock. On the same date, another check of JACCO of Texas was issued to ICT Insurance in the amount of $100,000.00 from JACCO of Texas and deposited to the Capital Stock Account of ICT Insurance. Therefore, as of March 5, 1952, the total amount paid by JACCO of Texas into the Capital Stock Account of ICT Insurance was only the total amount of $300,000.00; one-half of which, as hereinabove alleged, were proceeds from such $150,000.00 loan.

102.

The $150,000.00 loan from the Mercantile Bank to JACCO of Texas and/or Ben Jack Cage was finally paid on April 4, 1952, with a total interest of $548.61. Under

the agreement with the Mercantile Bank, JACCO of Texas and/or Ben Jack Cage used the proceeds from the installments received on such stock subscriptions and the sale of such stock with which to repay said loan. At the time that the Application for Charter Amendment was made by Ben Jack Cage and John G. Vaughan, and at the time that they made their affidavits on the 29th day of February 1952, that the additional 20,000 shares of stock had been fully subscribed and paid for, and at the time that [fol. 113] Meyer J. Rachofsky, as representative of the Mercantile Bank, made his affidavit on the 4th day of March 1952, to aid in the obtaining of such amendment to the charter of ICT Insurance for such capital increase in the amount of 20,000 shares, all such defendants knew that the 20,000 shares of stock of ICT Insurance represented by such stock increase had not been fully paid for. These defendants knew and are charged with knowledge that in order to effectuate such capital stock increase of ICT Insurance, the law required that the entire 20,000 shares of additional stock be paid for in cash before the charter amendment could be issued, and therefore, they knew that by reason of the fact that the stock was selling for $22.00 per share, the total amount of $440,000.00 would have to be paid to ICT Insurance, free and clear of any encumbrances. These defendants, Ben Jack Cage, John G. Vaughan, Nile E. Ball, JACCO of Texas and the Mercantile Bank knew that when such affidavits were made and when the Charter Application was approved, that the total amount of $300,000.00 was the only consideration that had been paid in to ICT Insurance by JACCO of Texas for the alleged purchase by JACCO of Texas of the 20,000 shares of stock. These defendants further knew and are charged with knowledge that out of only the $300,000.00 that had been paid in to ICT Insurance, that $150,000.00 of such amount was borrowed money and that the proceeds from the installment contracts, which were assets of ICT Insurance, were to be used to repay such loan. These defendants knew that JACCO of Texas was acting as agent for ICT Insurance in the sale of such stock and that as such agent, he did not have the authority to purchase such stock in his own name and for his own personal benefit.

These defendants knew and are charged with knowledge of the law that while acting as agent for ICT Insurance in such transaction, JACCO of Texas was acting for its principal ICT Insurance and that in truth and in fact, the $150,000.00 loan was a loan to ICT Insurance; that if such loan were not a loan to ICT Insurance but a loan to JACCO of Texas, then these defendants are charged with knowl- [fo.. 114] edge and knew that JACCO of Texas was using assets of ICT Insurance in the form of stock of ICT Insurance and proceeds from sales of ICT Insurance stock to secure such loan of JACCO of Texas and that JACCO of Texas was using monies of ICT Insurance collected on the stock subscriptions owned by ICT Insurance to repay such loan of JACCO of Texas.

103.

Each of these defendants, Ben Jack Cage, JACCO of Texas, John G. Vaughan, Nile E. Ball and the Mercantile Bank knew that to the extent of $150,000.00 that the capital increase in the amount of $400,000.00 was borrowed money; each of these defendants knew that under the law that stock could not be sold outright or on an installment basis until such stock had been authorized through a charter amendment; these defendants knew that prior to such charter amendment, the 20,000 shares of additional stock had been sold or was being sold outright or on an installment basis and that the 20,000 shares had not been paid for and knew their affidavits were false. Through the sale of such unauthorized stock, through the use of such borrowed money, and through the subterfuge of JACCO of Texas allegedly purchasing such 20,000 shares of stock as hereinbefore alleged, these defendants misrepresented to the State through their false affidavits that the entire amount of 20,000 shares of stock had been subscribed and paid for; all of such acts were a fraud as against ICT Insurance and its claimants, creditors, policyholders, stockholders and the public. By such fraudulent acts, Ben Jack Cage, Nile E. Ball and John G. Vaughan as officers and directors breached their fiduciary duty to ICT Insurance and by the fraudulent acts of the Mercantile Bank and

JACCO of Texas, they joined, aided, and abetted in such officers' and/or directors' breach of duty to ICT Insurance, and all of such defendants aided, abetted, and furthered the conspiracy through the means of obtaining cash in ICT Insurance, through the sale of its worthless stock, in order to obtain operating cash, and in order to keep ICT [fol. 115] Insurance operating although ICT Insurance was hopelessly insolvent.

104.

In the alternative, the Receiver alleges that by such fraudulent acts of the Mercantile Bank in joining and aiding Ben Jack Cage and the other officers and/or directors in representing in such Charter Amendment that the full amount of such capital increase had been fully paid in, the Mercantile Bank is estopped from contending otherwise, and therefore, when the Mercantile Bank accepted $150,000.00 in repayment of the borrowed money used in connection with such capital increase, such act of the Mercantile Bank constituted a conversion and misappropriation of such cash assets of ICT Insurance, for which amount the Receiver herein sues to recover from the Mercantile Bank on behalf of ICT Insurance and its claimants, creditors, policyholders and stockholders.

105.

Subsequent to such charter amendment, from March 5, 1952, JACCO of Texas, as agent for ICT Insurance, continued to sell stock of ICT Insurance outright and on an installment basis to unions, union members and the public in huge quantities, although at the time ICT Insurance was hopelessly insolvent. In May 1952, JACCO of Texas had again sold outright and on an installment basis far in excess of the number of shares of stock of ICT Insurance that were authorized and, therefore, it became necessary to again obtain a Charter Amendment in order to obtain authorized shares of stock with which to fulfill the commitments on such stock sales. On the 11th day of May 1952, Ben Jack Cage as President of ICT Insurance, and Francis J. Knoll as Secretary, applied to the Attorney General of the State of Texas for another

amendment to the Articles of Incorporation of ICT Insurance so as to increase the capital from $600,000.00 to $1,000,000.00, or an increase in the capital in the amount of $400,000.00 represented by an increase of additional shares of the capital stock in the amount of 40,000 shares. On the same date, Ben Jack Cage and Francis J. Knoll [fol. 116] executed the following affidavit:

"Affidavit as to the Payment of Increase in Capital Stock of The Insurance Company of Texas

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Ben Jack Cage and Francis Knoll, known to me, each of whom having been duly sworn on his oath, states for himself that they, the said Ben Jack Cage and Francis Knoll, are President and Secretary, respectively, of The Insurance Company of Texas.

That they are the identical parties who executed the Certificate of Amendment of The Articles of Incorporation of said corporation whereby its capital stock was increased so that as increased said capital stock amounts to $1,000,000.00 divided into 100,000 shares of common voting stock of a par value of $10.00 each.

That the increase in the amount of common stock of the said corporation amounts to $400,000.00 represented by 40,000 shares of common voting stock with a par value of $10.00 each, fully paid in cash and credited to the capital stock account of the said corporation.

/s/ Ben Jack Cage

/s/ Francis Knoll

Subscribed and sworn to, before me, by the said Ben Jack Cage and Francis Knoll on this the 14th day of May, 1952.

/s/ E. Wells
Notary Public in and for
Dallas County, Texas"

These instruments, together with a certified copy of the Minutes of the Stockholders' Meeting held in Dallas, Texas, supposedly authorizing the increase of the capital shares outstanding from 60,000 to 100,000 shares, were submitted to the Attorney General of the State of Texas on the 14th day of May 1952. To, and based upon the information and representations contained therein, the Attorney General approved the Amendment to ICT Insurance Company's Articles of Incorporation, increasing its capital from $600,000.00 to $1,000,000.00 represented by 100,000 shares.

[fol. 117] 106.

At the time that such instruments were prepared, and at the time that they were submitted to the Attorney General for approval, and at the time that same were approved, Ben Jack Cage, John G. Vaughan, Francis J. Knoll and Nile E. Ball knew that the additional 40,000 shares of stock had not been fully subscribed and paid for; they knew that such additional 40,000 shares of stock had not been fully paid for, for the following reason: As of such time, JACCO of Texas had collected $400,000.00 on the outright sale of such stock and on the down-payment and installments from installment contracts for the sale of such stock. On May 13, 1952, JACCO issued its check which was signed by Ben Jack Cage and John G. Vaughan, payable to the Insurance Company of Texas Capital Stock Account; such check, on the same date, was deposited to the Capital Stock Account of ICT Insurance in the Mercantile Bank. After the charter amendment on May 14, 1952, this $400,000.00 was transferred from the capital stock account to the regular operating account of ICT Insurance in the Mercantile Bank. At the time of such charter amendment, this 40,000 shares of additional stock had been sold or was in the process of being sold by JACCO of Texas both outright and on installment contracts at approximately $22.00 per share. Therefore, in order for such stock to be fully paid for and in order to obtain such charter amendment, it was necessary that the total amount of $880,000.00 be paid into ICT Insurance. Therefore, at the time that the application for the charter amendment was made by Ben Jack Cage as President, and Francis J. Knoll as Secretary, and at the

time that they made their affidavit on the 14th day of May 1952, wherein they swore that the 40,000 shares of stock had been paid for, such defendants knew that such affidavits were false. These defendants knew and are charged with knowledge that in order to effectuate such capital stock increase of ICT Insurance in the amount of 40,000 [fol. 118] shares, the law required that the entire 40,000 shares of additional stock be paid for before the charter amendment could be obtained and before the stock could be issued, and therefore, the total amount of $880,000.00, being the total sales price of such stock would have to be paid in to ICT Insurance. Through the sale of such unauthorized stock, and through the misrepresentations made in the application and affidavit for such charter amendment, these defendants misrepresented to the State that the entire amount of 40,000 shares of stock had been paid for. All of such acts of these defendants were a fraud against ICT Insurance and its creditors, claimants, policyholders and the public and was a breach of their duties as officers and/or directors to ICT Insurance, and by such fraudulent acts they aided, furthered, and abetted the conspiracy through the means of obtaining cash in ICT Insurance through the sale of its worthless stock, in order to obtain operating cash to keep ICT Insurance operating, although ICT Insurance was hopelessly insolvent.

107.

Prior to June 30, 1952, Ben Jack Cage, Francis J. Knoll, and John G. Vaughan knew that as of June 30, 1952, the Insurance Department of the State of Texas was to make an examination of the affairs of ICT Insurance and Continental Fire; that in contemplation of and in order to paint a better financial position of ICT Insurance as of June 30, 1952, the date which such examination was to be made, Ben Jack Cage approached the Republic Bank for a loan in the amount of $500,000.00 in order that such $500,000.00 could be transferred over to ICT Insurance and thereby show a better cash position in such examination report. This transaction was effected in the following manner: On June 28, 1952, Ben Jack Cage approached Oscar C. Bruce, Senior Vice-President and member of the Executive Com-

mittee of the Republic Bank for a loan in the amount of $500,000.00, to be secured by 21,704 shares of ICT Insurance Company's capital stock and life insurance on the life [fol. 119] of Ben Jack Cage. It was represented to the bank that the proceeds of the loan applied for would be placed to the credit of ICT Insurance in the Republic Bank; it was further agreed as between Ben Jack Cage and the Republic Bank that the proceeds of the loan would remain on deposit in ICT Insurance Company's account with the bank throughout the duration of the loan as security for such personal loan to Ben Jack Cage.

108.

Pursuant to such agreement, on June 28, 1952, such loan was made to Ben Jack Cage and the proceeds from such loan were deposited directly to the account of ICT Insurance on said date in the Republic Bank. On the records of JACCO of Texas and ICT Insurance as of the date of June 28, 1952, it was recorded that the $500,000.00 was paid over to ICT Insurance by ICT Insurance giving JACCO of Texas credit on JACCO's premium balances in the amount of $192,000.00 that JACCO of Texas owed ICT Insurance; by ICT Insurance giving to JACCO of Texas $109,375.00 credit on a Special Receivable Account for monies which were due ICT Insurance from JACCO of Texas; and by ICT Insurance transferring to JACCO of Texas $200,000.00 worth of U.S. Treasury Bonds at a cost of $198,625.00; that through such use of borrowed money, JACCO of Texas was enabled to clear up accounts that it owed ICT Insurance and thereby show ICT Insurance as having collected such amounts due from JACCO of Texas and thereby show ICT Insurance in a better financial condition.

109.

Such loan to Ben Jack Cage was finally repaid to the Republic Bank with a total interest of $3,538.85 on September 23, 1952. During all of such time, balances in ICT Insurance Company's account in the Republic Bank were maintained in an amount greater than the unpaid balance

of such loan under the agreement as between Ben Jack Cage and the Republic Bank when such loan was made.

[fol. 120] 110.

At the time that such loan was made, and at the time that it was agreed as between Ben Jack Cage and the Republic Bank that the proceeds of such loan would be deposited directly to the account of ICT Insurance, and at the time that it was agreed that the proceeds of the loan would remain on deposit with the Republic Bank throughout the duration of the loan, Ben Jack Cage and the Republic Bank knew that the proceeds from such loan deposited to ICT Insurance Company's account would be used and was used as security for such loan. Through such transactions and acts, assets of ICT Insurance in the form of a cash deposit in the Republic Bank was used by the Republic Bank as security for an individual loan to Ben Jack Cage. The Republic Bank and Ben Jack Cage knew that such deposit of ICT Insurance in the Republic Bank was not a free and unencumbered asset that ICT Insurance could use in paying the claims for losses of its policyholders, and in the payment of its obligations to creditors; furthermore, the Republic Bank knew and/or was charged with knowledge that at the time of such transaction, JACCO of Texas and/or Ben Jack Cage, the President of JACCO of Texas, was acting as agent of ICT Insurance in the sale of the stock of ICT Insurance. The Republic Bank knew, and/or was charged with knowledge, that as such agent, Ben Jack Cage was merely holding the 21,750 shares of stock of ICT Insurance for its principal ICT Insurance and therefore was using such asset of ICT Insurance as collateral for such loan; furthermore, the Republic Bank knew and/or was charged with knowledge, that the loan was to be paid and was paid from the proceeds of the sale of stock of ICT Insurance, which assets were likewise assets of ICT Insurance.

111.

That in the alternative, such loan was in effect a loan to ICT Insurance, through its agent, Ben Jack Cage, and the proceeds of such loan to ICT Insurance was used to

[fol. 121] secure such loan, and under the agreement with the Republic Bank that the proceeds from such loan would remain on deposit throughout the duration of such loan, such cash on deposit in the Republic Bank was not the free and unencumbered assets of ICT Insurance during the period of such loan with which to pay claims of its policyholders and debts due creditors.

112.

As will be hereinafter more fully alleged as of June 30, 1952, the Board of Insurance Commissioners through its representative, W. J. Noad, made an examination of the affairs of ICT Insurance. In connection with such examination, W. J. Noad, the examiner for the board, sent to the Republic Bank a Bank Verification for the purpose of verifying what amount of money ICT Insurance had on deposit in the Republic Bank free and clear as of June 30, 1952, the date of the examination. Such Bank Verification submitted to the Republic Bank and the Republic Bank's answer thereto is as follows:

"STATE OF TEXAS

DEPARTMENT OF INSURANCE

Examination of
The Insurance Company of Texas
For the
Department of Insurance
State of Texas

Dallas, Texas, July 29, 1952

Republic National Bank
Dallas, Texas

Gentlemen:

Among the assets of the above company on June 30, 1952 is a deposit in your institution. For the sole purpose of verifying the books, will you please fill out the attached certificate and return it in the enclosed stamped envelope?

Very respectfully yours,

/s/ W. J. Noad, Examiner

[fol. 122]

"(Location) Dallas, Texas
(Date) Jul 30 1952

This is to certify that at the close of business June 30, 1952, the books of the above bank showed a balance of a $500,922.00 due said insurance company and subject to its check and withdrawal; there were also certificates of deposits outstanding for $ None due, with interest due from at the rate of per cent.

On the same date the said insurance company was not indebted either directly or contingently to this institution for borrowed money, discounted notes or under any form of agreement, nor are any of the aforementioned deposits held by this institution as security for any loan made to an officer, director or employee of said insurance company, except: None

REPUBLIC NATIONAL BANK OF DALLAS, Dallas, Texas

By L. E. Elder, Auditing Dept."

113.

At the time that such Bank Verification was executed by the Republic Bank showing that ICT Insurance had a balance of $500,922.00 and that such amount was "due said Insurance Company and subject to its check and withdrawal" and that "On the same date the said Insurance Company was not indebted either directly or contingently to this institution for borrowed money, discounted notes or under any form of agreement, nor are any of the aforementioned deposits held by this institution as security for any loan made to an officer, director, or employee of said Insurance Company, except NONE" the Bank knew that such statements were false. The Republic Bank knew and is charged with knowledge that the sum of $500,922.00 as represented by the Bank was not subject to ICT Insurance Company's check and withdrawal as of June 30, 1952, because as hereinabove alleged, under the agreement between Ben Jack Cage, President of ICT Insurance, and Agent of

ICT Insurance and the Republic Bank, it was agreed that the $500,000.00 proceeds from the loan would remain on deposit with the Republic Bank throughout the duration of the loan and would act as security for such loan; that [fol. 123] at the time that such representation was made that ICT Insurance was not indebted either directly or contingently to the Republic Bank for borrowed money or under any form of agreement, the Republic Bank knew that such representations were false because as hereinbefore alleged, it was agreed by and between Ben Jack Cage and the Republic Bank that the loan would be repaid from the collections on stock subscriptions which were assets of ICT Insurance, and that furthermore, such loan was in effect a loan to ICT Insurance because the bank knew and/or was charged with knowledge that Ben Jack Cage was acting as agent for ICT Insurance in making such loan, and therefore, under such arrangement ICT Insurance was indebted either directly or contingently to the Republic Bank for borrowed money or under a form of agreement as hereinabove alleged; that furthermore, if such loan was not a loan to ICT Insurance but to Ben Jack Cage, the Republic Bank represented that none of the deposit held by the Republic Bank was held as security for any loan made to an officer, director, or employee of said insurance company because the Bank knew that such representations were false because if such loan was an individual loan to Ben Jack Cage it was a loan to an officer and/or director and/or employee of ICT Insurance by virtue of the fact that Ben Jack Cage was the President and a Director of ICT Insurance, and as hereinabove alleged, it was agreed as between Ben Jack Cage and the Republic Bank that the $500,000.00 proceeds of the loan would remain on deposit with the Republic Bank throughout the duration of the loan as security for such loan.

114.

By such fraudulent, illegal, and wrongful acts, Ben Jack Cage, John G. Vaughan, Francis J. Knoll and Nile E. Ball as officers and directors of ICT Insurance breached their fiduciary duties to ICT Insurance, and by such acts, aided, abetted, and furthered the conspiracy; that by virtue of

such false, fraudulent, illegal, and wrongful acts of the [fol. 124] Republic Bank in connection with this transaction as hereinbefore alleged, the Republic Bank joined, aided, and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance. Through the commission of such fraudulent acts, all of such defendants joined, aided, and abetted in the making of a false examination report of ICT Insurance, and thereby joined, aided, and furthered the conspiracy.

115.

In the alternative, the Receiver alleges that by such fraudulent acts of the Republic Bank in joining and aiding in misrepresenting in such examination report that $500,000.00 was the free and unencumbered cash assets of ICT Insurance, the Republic Bank is estopped from contending otherwise, and when the Republic Bank accepted cash assets of $500,000.00 plus interest in the repayment of such loan, such act of the Republic Bank constituted a conversion and misappropriation of such cash assets of ICT Insurance in such amount of $500,000.00; for which amount the Receiver herein sues to recover on behalf of ICT Insurance and its claimants, creditors, policyholders and stockholders.

116.

As hereinbefore alleged, arrangements were made for an examination of ICT Insurance and its subsidiary, Continental Fire, the examination date to be as of June 30, 1952. The Examiner and Representative of the Board of Insurance Commissioners that was sent to make such examination was W. J. Noad. Noad proceeded to the home offices of ICT Insurance and Continental Fire some time after June 30, 1952, and commenced making such examination, which examination was completed on September 29, 1952. During such time, ICT Insurance and Continental Fire occupied the same offices. At this time, as hereinbefore alleged, ICT Insurance and Continental Fire had substantially the [fol. 125] same officers and directors and had the same personnel handling the work of both companies. W. J. Noad and the examiners who were assigned to assist him in such examination occupied space in such companies' offices

for a period of approximately two months and purported to make an examination of these companies' affairs. During this time, all of the books, records, and other documents pertaining to ICT Insurance and Continental Fire's affairs were available to such examiners. On September 29, 1952, W. J. Noad submitted his written report to Mr. George B. Butler, Chairman of the Board of Insurance Commissioners. This report is what is commonly known as a "whitewash." Not only did it fail to report the numerous fraudulent transactions by which ICT Insurance manipulated its affairs by creating assets and hiding liabilities, but to the contrary, it covered up all of the irregularities of the operations of ICT Insurance.

117.

During the time that defendant W. J. Noad was making such examination, the settlement agreement hereinbefore alleged between ICT Insurance on the one hand, and Narragansett and La Comercial and Stuart B. Hopps on the other, had been entered into, which settlement agreement was dated and effective as of August 13, 1952. Defendant W. J. Noad knew that during the course of the examination, the reinsurance contracts as between ICT Insurance, Narragansett, and La Comercial were cancelled, and said settlement agreement hereinbefore alleged had been entered into. Furthermore, W. J. Noad knew that upon the termination of the bankers type reinsurance treaty as between ICT Insurance and Narragansett, that ICT Insurance entered into the bankers type quota share reinsurance agreement with Lloyds of London and the other foreign insurance companies using Continental Union as a foil, as hereinbefore pleaded.

[fol. 126]

118.

In connection with the bankers type reinsurance treaty as between ICT Insurance and Narragansett, W. J. Noad knew and was charged with knowledge that such treaty was not a bona fide reinsurance treaty and therefore ICT Insurance was not entitled to take credit for the unearned premium reserve and loss reserve on the business ceded

under such reinsurance treaty. W. J. Noad knew that the effect of such treaty as of June 30, 1952, was to give ICT Insurance surplus relief by reducing its total liabilities. Contrary to such knowledge in his sworn duties as an examiner, W. J. Noad gave effect to such reinsurance treaty in his examination report, the effect of which permitted ICT Insurance to show approximately $2,000,000. of net liabilities less than it actually had, and thereby showed ICT Insurance in a solvent condition in such examination report.

119.

In the examination of Continental Fire as of June 30, 1952, by giving effect to the receivable from Narragansett to Continental Fire and the bookkeeping entries as between ICT Insurance and Continental Fire concerning such receivable and the balances due as between ICT Insurance and Continental Fire, Continental Fire was permitted to offset the receivable from Narragansett of approximately $1,000,000. on its amount payable to ICT Insurance of approximately $2,000,000, and thereby benefit Continental Fire in its statement of approximately $1,000,000.; that W. J. Noad knew the receivable from Narragansett to Continental Fire was worthless and the assets that were transferred to ICT Insurance in such settlement agreement were either not admissible or were worthless or with ordinary diligence in carrying out his duties as an examiner, he could have ascertained the true facts. By giving effect to such receivable, Continental Fire was shown to be in a solvent condition, and in the examination report of ICT Insurance, W. J. Noad listed the stock of Continental Fire as an admitted asset at the value of $452,890.98.

[fol. 127] 120.

In such examination report, W. J. Noad likewise listed as an admissible asset $63,306.65 of stock of ICT Life when W. J. Noad knew and was charged with knowledge that such stock was not an admissible asset since ICT Life had not been in existence for a period of five years and had not paid dividends for a period of five years. At the time of making such examination report, W. J. Noad knew, as

shown by such report, that as of June 30, 1952; ICT Insurance had outstanding the surplus notes in the amount of $586,091.82 which had been issued to La Comercial by ICT Insurance in the purchase of the Continental Fire stock. This liability was not set up as a full liability in such examination report.

121.

Attached to the report was an affidavit sworn to by W. J. Noad on the 8th day of October 1952, stating: "That the Statements, Exhibits and Data therein contained are true and correct to the best of his knowledge and ability." Contrary to such affidavit, W. J. Noad knew that such examination report, in respects to the matters hereinbefore alleged, was not true and that he knew that as of June 30, 1952, ICT Insurance did not have capital in the amount of $1,000,000.00 and surplus in the amount of $500,000.00 as shown in such report, but on the contrary, he knew that ICT Insurance was insolvent, or by the exercise of any reasonable amount of diligence, he could have determined that the representations made in such statement were false.

122.

Thus, by reason of the facts hereinbefore alleged surrounding the examination of Continental Fire and ICT Insurance, W. J. Noad embraced and entered into the existing conspiracy and aided, furthered, and abetted same. Likewise, as hereinbefore alleged, by the Republic Bank executing the false Bank Verification to W. J. Noad in the course of such examination, the Republic Bank joined, aided and abetted in the making of such false examination report of ICT Insurance. Likewise, all the defendants here-[fol. 128] inbefore named who as hereinbefore alleged, engineered and participated in these fals and fraudulent transactions to create the assets and to hide the liabilities of ICT Insurance as reflected in ICT Insurance Company's records and books as of June 30, 1952, joined, aided, abetted, and furthered the conspiracy. The Receiver alleges that had the Republic Bank truthfully certified the facts to the Board regarding the true status of the $500,922.00 deposit

in the Republic Bank, that had the defendants above-named truly reflected ICT Insurance Company's financial condition on its records and books, and that had W. J. Noad made a true and correct report of ICT Insurance Company's affairs, the fact that ICT Insurance was in an insolvent condition would have been revealed to the Board and to the State and the Attorney General would have been bound in law to have forfeited ICT Insurance Company's rights to do business and thus prevented the subsequent damages to ICT Insurance and its claimants, creditors, policyholders, and stockholders in the amount of approximately $15,000,000.00, for which amount of damages the Receiver sues herein. Such examination report was submitted to the insurance departments of other states as a basis for showing ICT Insurance qualified to commence doing business in such states.

123.

On or about October 6, 1952, a Note was executed to ICT Insurance for $300,000.00 by Ben Jack Cage and/or JACCO of Texas and/or JACCO of Alabama. This note was discounted by the Mercantile Bank with recourse against ICT Insurance and with the proceeds from such discount deposited directly to the account of ICT Insurance. The effect of such transaction was a loan by the Mercantile Bank to ICT Insurance. The $300,000.00 was deposited to ICT Insurance Company's account in the Mercantile Bank on October 6, 1952, and on the same date, ICT Insurance issued its check to JACCO of Alabama in the amount of $300,000.00, which $300,000.00 on the same date was deposited to JACCO of Alabama's account in the Mercantile Bank. The $300,000.00 was all repaid by December 31, 1952. During such period of time, the $300,000.00 was used by JACCO [fol. 129] of Alabama and Ben Jack Cage. The $300,000.00 proceeds from such loan was not set up in the general books of ICT Insurance for the repayment of such loan. Therefore, through such transaction, Ben Jack Cage, John G. Vaughan, Francis J. Knoll and Nile E. Ball used ICT Insurance as a guarantor on a loan to Ben Jack Cage and/or Jack Cage of Texas and/or JACCO of Alabama without

reflecting such transaction in the books of ICT Insurance. Through such transactions, such funds of ICT Insurance in the amount of $300,000.00 was used by these defendants for a period of three months for their own benefit, and in order to cover up such transactions, these transactions were not listed or stated in the records of ICT Insurance; such transactions by Ben Jack Cage, John G. Vaughan, Francis J. Knoll, Nile E. Ball, JACCO of Texas, and JACCO of Alabama was a conversion and misappropriation of the funds of ICT Insurance, was a breach of such individual's fiduciary relation to ICT Insurance, and which transaction aided, abetted, and furthered the conspiracy.

124.

Ben Jack Cage, Nile E. Ball, John G. Vaughan, and JACCO of Texas continued to sell stock outright and on an installment basis, although at the time such sales were made, there was not sufficient stock of ICT Insurance authorized to fulfill such sales. Therefore, it was again necessary to obtain another charter amendment of ICT Insurance increasing its amount of capital stock in order that stock would be available to fulfill such sales. Again, at the time that such stock was sold and was being sold, these defendants knew that such sales were not sales of stock of ICT Insurance which were authorized, and knew at the time that such sales were made that ICT Insurance did not have sufficient unissued shares of stock with which to fulfill such sales. Therefore, again, in order to increase the authorized shares of ICT Insurance in order to obtain stock with which to fulfill such sales, a plan and scheme was devised and carried out whereby the capital stock increase would be effected through means of borrowed money by ICT Insurance using Jack Cage and Company of Texas, its agent, as a foil. This transaction occurred in the following manner: On the 10th day of November 1952, Ben [fol. 130] Jack Cage as President and Member of the Executive Committee of the Board of Directors of ICT Insurance, John G. Vaughan as Vice-President, and member of the Executive Committee of the Board of Directors of ICT Insurance, Nile E. Ball as Vice-President and member of the Executive Committee of the Board of Directors of ICT

Insurance, and Francis J. Knoll as Secretary of ICT Insurance, filed an affidavit for the amendment to the Charter of ICT Insurance, increasing the amount of authorized stock in the amount of 40,000 shares by increasing the capital stock from $1,000,000.00 represented by 100,000 shares of capital stock to $1,400,000.00 represented by 140,000 shares of stock. On the same date of November 10, 1952, Ben Jack Cage, John G. Vaughan, Nile E. Ball and Francis J. Knoll in the capacities above set forth, executed an affidavit titled "Affidavit of Full Subscription to and Payment for Stock Increase of The Insurance Company of Texas," which said affidavit is as follows:

"Affidavit of Full Subscription to and Payment for Stock Increase of the Insurance Company of Texas

THE STATE OF TEXAS)
) KNOW ALL MEN BY THESE
) PRESENTS THAT:
COUNTY OF DALLAS)

On this 10th day of November, 1952, personally appeared Ben Jack Cage, John G. Vaughan, Nile E. Ball, and Francis J. Knoll, known to me to be the following officials of The Insurance Company of Texas, to-wit:

Ben Jack Cage, President and member of the Executive Committee of the Board of Directors,

John G. Vaughan, Vice President and member of the Executive Committee of the Board of Directors,

Nile E. Ball, Vice President and member of the Executive Committee of the Board of Directors, and

Francis J. Knoll, Secretary;

who on oath did depose and say, each for himself:

That they are the identical parties who executed [fol. 131] the certificate of amendment to the charter of The Insurance Company of Texas, to which this

affidavit is affixed, that the effect of the provisions of B. thereof, is to increase the capital stock of said company from One Million Dollars ($1,000,000.00) (consisting of one hundred thousand (100,000) shares, each having a par value of Ten Dollars ($10.00) to One Million Four Hundred Thousand Dollars ($1,400,000.00) (consisting of 140,000 shares, each having a par value of Ten Dollars ($10.00), and thus to increase the capital stock of said company by an additional forty thousand (40,000) shares, each of a par value of Ten Dollars ($10.00).

That the full amount of the aforementioned 40,000 additional shares has been in good faith subscribed and that the said full amount has been paid in, in cash. The amount subscribed for the additional 40,000 shares is the sum of Nine Hundred Thousand Dollars ($900,000.00). The amount paid in for the said additional 40,000 shares is the sum of Nine Hundred Thousand Dollars ($900,000.00), which sum has been paid in cash, as evidenced by duplicate deposit statement in said amount, issued by Republic National Bank of Dallas.

That the sum of Four Hundred Thousand Dollars ($400,000.00) of the said sum of Nine Hundred Thousand Dollars ($900,000.00) (the total par value of the 40,000 additional shares) is being credited to the capital of the company and that the sum of Five Hundred Thousand Dollars ($500,000.00) of the said sum of Nine Hundred Thousand Dollars ($900,000.00) is being credited to the surplus of the company.

/s/ Ben Jack Cage, President and member of the Executive Committee of the Board of Directors.

/s/ John G. Vaughan, Vice President and member of the Executive Committee of the Board of Directors.

/s/ Nile E. Ball, Vice President and member of the Executive Committee of the Board of Directors.

/s/ Francis J. Knoll, Secretary.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Ben Jack Cage, John G. Vaughan, Nile E. Ball, Francis J. Knoll, respectively, this 10th day of November, 1952, to certify which witness my hand and seal of office.

/s/ E. Wells, Notary Public,
Dallas County, Texas

(Here attach duplicate bank deposit statement)"

On the same date, Oscar C. Bruce, Senior Vice President of the Republic Bank, executed, subscribed and swore to the following affidavit:

[fol. 132]

"AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Oscar C. Bruce, who after being duly sworn on his oath, states that he is Senior Vice President of the Republic National Bank of Dallas, Dallas, Texas.

That The Insurance Company of Texas, A Texas Corporation, with principal office in Dallas, Texas, has on this date on deposit with the Republic National Bank of Dallas the sum of Nine Hundred Twenty Thousand Dollars ($920,000.00) in a Special Account titled "Capital Stock Account," that said deposit is separate and apart from the general account of such corporation.

That, insofar as this bank knows, there are no liens or attachments on said account and the entire sum of $920,000.00 is subject to the transfer or withdrawal by the proper recorded officers of the corporation.

/s/ Oscar C. Bruce

Subscribed and sworn to, before me, by the said Oscar C. Bruce on this 10th day of November, 1952.

/s/ James W. Keay
Notary Public in and for
Dallas County, Texas"

125.

These affidavits, together with a Certified Resolution of a Stockholders' and Directors' meeting authorizing such capital increase of ICT Insurance, were submitted to the Attorney General of the State of Texas on the 14th day of November 1952, and based upon the information and sworn representations contained therein, the Attorney General approved the amendment to ICT Insurance Company's Articles of Incorporation, increasing its capital stock from $1,000,000.00 to $1,400,000.00, represented by an increase of 40,000 additional shares.

126.

At the time such instruments were prepared, at the time [fol. 133] that they were executed, at the time that they were submitted to the Attorney General for approval, and at the time that said were approved, Ben Jack Cage, John G. Vaughan, Nile E. Ball, Francis J. Knoll, and the Republic Bank knew that the representations contained in such affidavits were false; they knew this by reason of the fact that such capital increase was effected in the following manner: On October 10, 1952, Ben Jack Cage, as President of JACCO of Texas, and Francis J. Knoll, as Secretary-Treasurer of JACCO of Texas made an application at the Republic Bank through Oscar C. Bruce, Vice-President, for a loan of $920,000.00. In such loan application there was represented and the Republic Bank knew that the purpose of the $920,000.00 loan was to use the proceeds of such loan to increase the capital stock of ICT Insurance in the amount of 40,000 shares. It was represented that the loan would be secured by such 40,000 shares of ICT Insurance Company's stock at an alleged cost of $23.00 per share. It was further agreed as between Jack Cage and Company of Texas, Ben Jack Cage, and the Republic Bank that the loan would also be secured by an assignment to the Republic Bank of the proceeds of stockholder subscriptions of ICT Insurance Company, aggregating approximately 250,000 shares. It was further agreed and understood that the loan would be repaid out of collections from such stock subscriptions. It was further

agreed as between JACCO of Texas, Ben Jack Cage as President of JACCO of Texas and as President of ICT Insurance that the proceeds from the loan would be allegedly used by JACCO of Texas to purchase the 40,000 shares of ICT Insurance stock represented by the Charter Amendment. It was further agreed that the $920,000.00 would be deposited to the account of ICT Insurance and that ICT Insurance would maintain with the Republic Bank in the account of ICT Insurance at least a sufficient amount of such cash to cover the existing balances on the loan owing the Bank by Ben Jack Cage as security for such loan.

[fol. 134] 127.

On October 30, 1952, Jack Cage and Company of Texas, by Ben Jack Cage, President, and Francis J. Knoll, Secretary-Treasurer, and also Ben Jack Cage individually, executed a note to the Republic Bank in the amount of $920,000.00, with interest, from date of said note to maturity at 4 per cent per annum, payable $100,000.00 per month, plus interest, beginning December 1, 1952, for five months with the unpaid balance due and payable on the sixth month. On the same date, JACCO of Texas and Ben Jack Cage executed an assignment whereby 40,000 shares of the capital stock of ICT Insurance was sold, assigned, and transferred to the Republic Bank as security for such loan, and likewise, on the same date, in a separate collateral agreement assigned such 40,000 shares of the stock of ICT Insurance to the Republic Bank to secure such loan. Likewise, on the same date, Jack Cage and Company, Inc., by Ben Jack Cage, President, and Ben Jack Cage, individually, transferred, sold, and assigned to the Republic Bank subscriptions for stock of ICT Insurance, aggregating 250,000 shares as additional security for such loan. Likewise, on October 30, 1952, Ben Jack Cage as President of ICT Insurance, executed ICT Insurance Company's letter to the Republic Bank to the attention of Oscar C. Bruce, whereby it was agreed:

"Further, it is agreed that we will maintain with Republic National Bank in the account of The Insurance

Company of Texas at least a sufficient amount of cash to cover the existing balances on loans owing the bank by Ben Jack Cage. The $920,000.00 will be left in accounts with Republic National Bank."

Pursuant to such agreement, on November 10, 1952, the proceeds from such loan in the amount of $920,000.00 were deposited direct to ICT Insurance Company's account and were used as additional security to secure such alleged loan to JACCO of Texas and/or Ben Jack Cage. The proceeds from this loan deposited to ICT Insurance Company's account supposedly made up the payment to ICT Insurance for the additional 40,000 shares of stock of ICT Insurance [fol. 135] represented by the Charter Amendment.

128.

This $920,000.00 alleged loan to Jack Cage and Company and/or Ben Jack Cage was finally paid off March 12, 1953, with a total interest of $10,015.44. Under the terms of the agreement and understanding as between these defendants, JACCO of Texas and/or Ben Jack Cage used the proceeds from the sale of stock and the collections on the installment contracts with which to repay said loan.

129.

At the time that the application for the charter amendment was made by Ben Jack Cage, John G. Vaughan, Francis J. Knoll and Nile E. Ball, and at the time they made their sworn affidavit on November 10, 1952 that the additional 40,000 shares of stock had been fully subscribed and paid for, and at the time that Oscar C. Bruce made his sworn affidavit that insofar as the Republic Bank knew there were no liens or attachments on said $920,000.00 account and the entire sum of $920,000.00 was subject to the transfer or withdrawal by the proper recorded officers of ICT Insurance, and at the time that such charter amendments and affidavits were filed with the Attorney General and at the time that the Charter Amendment was approved by the Attorney General authorizing the capital increase of

40,000 shares, all of such defendants knew that the 40,000 shares of stock of ICT Insurance represented by such charter amendment had not been fully subscribed and paid for. Each of these defendants knew and are charged with knowledge that in order to effectuate the capital increase of ICT Insurance, the law required that the entire 40,000 shares of additional stock be subscribed and fully paid for before the charter amendment could be obtained and before the stock could be issued, and therefore, the total amount of $920,000.00 would have to be paid into ICT Insurance free and clear of any encumbrances. At the time [fol. 136] that the loan was made by the Republic Bank to Jack Cage and Company of Texas and/or Ben Jack Cage, the Bank knew and was charged with knowledge that Jack Cage and Company of Texas was acting as an agent for ICT Insurance under a management contract in the sale of ICT Insurance Company's stock. These defendants knew that as such agent, Jack Cage and Company of Texas did not have the authority to purchase such stock in its own name. These defendants knew and are charged with knowledge of law that while acting as agent of ICT Insurance in such transaction, JACCO of Texas was acting for its principal ICT Insurance, and that in truth and in fact, the $920,000.00 loan was a loan to ICT Insurance. That is such loan was not a loan to ICT Insurance, then these defendants are charged with knowledge and knew that JACCO of Texas and/or Ben Jack Cage were using the assets of ICT Insurance in the form of stock of ICT Insurance and the installment stock contracts of ICT Insurance, and the $920,000.00 cash of ICT Insurance on deposit in ICT Insurance Company's account in the Republic Bank as security for the loan by Republic Bank to JACCO of Texas and/or Ben Jack Cage. These defendants further knew and are charged with knowledge that assets of ICT Insurance being proceeds from the sale of ICT Insurance stock and collections on the installment stock contracts was to be used and was used to repay such indebtedness of Jack Cage and Company of Texas and/or Ben Jack Cage; that at the time that Oscar C. Bruce, Vice-President of the Republic Bank, swore:

"That, insofar as this bank knows, there are no liens or attachments on said account and the entire sum of $920,000.00 is subject to the transfer or withdrawal by the proper recorded Officers of the Corporation." The Republic Bank knew that such affidavit was false. The Republic Bank, contrary to such sworn affidavit, knew that there were liens or attachments on said funds by virtue of the agreement by and between JACCO of Texas, Ben Jack Cage, as President of ICT Insurance, and the Republic [fol. 137] Bank, in which it was agreed that ICT Insurance would maintain with the Republic Bank in the account of ICT Insurance, at least a sufficient amount of cash to cover the existing balances on such loan and that the $920,000.00 would be left in ICT Insurance Company's bank account with the Republic Bank as security for such loan. Further, the Republic Bank knew, contrary to such sworn affidavit, that the entire sum of $920,000.00 was not subject to the transfer or withdrawal by the proper recorded officers of ICT Insurance by reason of such agreement. At the time that such affidavit was made, the Republic Bank knew that such affidavit was made in connection with and for the purpose of aiding the capital increase of ICT Insurance in the amount of 40,000 shares through a charter amendment. The Republic Bank knew and was charged with knowledge that the charter amendment was supposedly being made upon the basis that the 40,000 shares of stock was being sold for $23.00 per share; or a total of $920,000.00, and that such amount was required under the law to be fully paid in, free and clear of any encumbrances before such charter amendment could be approved by the Attorney General. The Bank knew that at the time that such affidavit was prepared, that at the time that it was submitted to the Attorney General of the State of Texas in connection with such charter amendment, and at the time that such charter amendment was approved by the Attorney General in reliance upon such affidavit, that such affidavit was false in that the amount of $920,000.00 had not been paid in to ICT Insurance free and clear of any liens, attachments or encumbrances as required by law and that the entire amount of $920,000.00

was not subject to the transfer or withdrawal by the officers of ICT Insurance.

130.

Through such dishonest, fraudulent, and illegal acts, the defendants Ben Jack Cage, JACCO of Texas, John C. Vaughan, Nile E. Ball, Francis J. Knoll and the Republic Bank through the sale of unauthorized stock and the use [fol. 138] of borrowed money and the false affidavits, Thimble rigged the State into issuing a charter amendment to ICT Insurance for the sale of an additional 40,000 shares of its capital stock, thereby creating additional obligations that ICT Insurance could not fulfill; all of such acts were a fraud as against ICT Insurance and its claimants, creditors, policyholders, stockholders, and the public. That such fraudulent acts of Ben Jack Cage, John G. Vaughan, Nile E. Ball and Francis J. Knoll were a breach of such officers' and/or directors' fiduciary duty to ICT Insurance, and by the fraudulent acts of JACCO of Texas and Republic Bank, they joined, aided and abetted such officers and/or directors in such breach of their fiduciary duty. That all of such defendants aided, furthered, and abetted the conspiracy through the means of obtaining cash in ICT Insurance, through the sale of its worthless stock in order to obtain operating cash to keep ICT Insurance operating, although ICT Insurance was hopelessly insolvent.

131.

In the alternative, the Receiver alleges that by such fraudulent acts of the Republic Bank in falsely representing to the Attorney General that the $920,000.00 was the free and unencumbered assets of ICT Insurance to thereby fraudulently aid Ben Jack Cage and the other defendants to obtain such charter amendment and by defendant Republic Bank joining and aiding in falsely representing in ICT Insurance Company's Annual Statement as of December 31, 1952. that ICT Insurance had $1,100,000.00 U.S. Treasury Bills free and unencumbered, as will be hereinafter alleged, the Republic Bank is estopped from contending otherwise; and when the Republic Bank accepted

$920,000.00 cash assets of ICT Insurance in repayment of such loan, such acts of Republic Bank constituted a conversion and misappropriation of cash assets of ICT Insurance in such amount of $920,000.00, for which amount the Receiver sues herein to recover on behalf of ICT In[fol. 139] surance and its claimants, creditors, policyholders, and stockholders.

132.

That in order to show a false financial picture of a better liquid position in the December 31, 1952 Annual Statement of ICT Insurance and to hide liabilities which arose in connection with such transaction, on December 30, 1952, Ben Jack Cage and Francis J. Knoll entered into the following transaction with defendant Republic Bank: On December 30, 1952, Ben Jack Cage as President of ICT Insurance, made an application for a loan to ICT Insurance with Oscar C. Bruce, Senior Vice-President of the Republic Bank. It was agreed by and between Ben Jack Cage and Oscar C. Bruce, Senior Vice-President of the Republic Bank that a loan would be made to ICT Insurance in the amount of $250,000.00 at 4 per cent interest for three days. It was agreed that ICT Insurance would pledge premium notes with an aggregate unpaid balance of $253,000.00. It was further agreed and understood as between Ben Jack Cage and Oscar C. Bruce, as Senior Vice-President of Republic Bank, that the $250,000.00 funds being the proceeds from such loan was to be used to purchase U.S. Treasury Bonds. It was further agreed by and between Ben Jack Cage and Oscar C. Bruce, as Vice-President of the Republic Bank, that these bonds also would be held as collateral. It was understood as between these defendants that this was a year-end transaction.

133.

Under such agreements, and in accordance therewith, on December 30, 1952, ICT Insurance executed its note payable to the Republic Bank in the amount of $250,000.00, payable in three days, bearing interest at the rate of four per cent, which note was signed by ICT Insurance by Ben

Jack Cage, President, and Francis J. Knoll, Secretary-Treasurer. On the same date, a separate collateral agreement was executed by ICT Insurance, signed by Ben Jack Cage, President, and Francis J. Knoll, Secretary-Treasurer, wherein U.S. Treasury Bonds with a par value of $250,000.00 were pledged and transferred to such bank as collateral for such loan. On the same date, another [fol. 140] separate collateral agreement was executed by ICT Insurance, signed by Ben Jack Cage, President, and Francis J. Knoll, Secretary-Treasurer, whereby premium notes of ICT Insurance, aggregating $253,723.42, were pledged and transferred to the Republic Bank as collateral for such loan.

134.

On December 31, 1952, the $250,000.00 representing the proceeds from such loan was deposited to the capital stock account of ICT Insurance. This $250,000.00, together with the balance of the proceeds of the $920,000.00 loan hereinabove alleged which was likewise deposited and held in this account as collateral for such $920,000.00 loan, and together with other monies, on December 31, 1952, totaled $1,171,110.31. On December 31, 1952, $1,100,000. of such deposit of ICT Insurance was used by the Republic Bank as agent for ICT Insurance to purchase U.S. Treasury Bills in the principal amount of $1,100,000. Such U.S. Treasury Bills purchased by the Republic Bank were part of U.S. Treasury Bills Nos. 581739 and 581731. Such Treasury Bills in such amount were never in fact delivered over to ICT Insurance or ever came into possession of ICT Insurance, but were at all times held in the possession of the Republic Bank as security for the unpaid balance of the $920,000.00 loan, which unpaid balance as of December 31, 1952, was $720,000.00. Such Treasury Bills as hereinabove alleged to the extent of $250,000.00 were held as collateral by the Republic Bank on the $250,000.00 loan of December 30, 1952, to ICT Insurance.

135.

On January 2, 1953, the Republic Bank as agent of ICT Insurance, sold the $1,100,000.00 worth of U.S. Treasury

Bills and deposited the $1,100,000.00 in the capital stock account of ICT Insurance. On the same date, the Republic Bank charged ICT Insurance Company's account in the amount of $250,055.55 and took such $250,055.55 as a re- [fol. 141] payment to the Republic Bank on the December 30, 1952, $250,000.00 loan, which amount of $250,055.55 represented payment to the Republic Bank of the principal plus interest on such loan. The balance of the proceeds from the sale of the $1,100,000.00 of U.S. Treasury Bills continued to remain on deposit in ICT Insurance Company's account in the Republic Bank in the amount exceeding the unpaid balance that continued to remain due on the $920,000.00 loan until such loan was finally repaid.

136.

At the time that such transaction was entered into and carried out, the Republic Bank knew and was charged with knowledge that as of December 31, 1952, ICT Insurance was required to file its sworn annual statement, showing its true financial condition in order to enable it to continue to do business for the coming year. The Bank knew that such transaction was a year-end window dressing transaction for ICT Insurance Company's Annual Statement purpose. The Bank knew that such loan transaction was entered into to aid in showing a better liquid and financial position in ICT Insurance Company's annual statement. The Bank knew and was charged with knowledge that the only purpose of such loan was to enable ICT Insurance in its annual statement to substitute U.S. Treasury Bills in the amount of $250,000.00 for installment premium notes. The Bank knew and was charged with knowledge that the $250,000.00 U.S. Treasury Bills was not a free and unencumbered asset by reason of the fact that by reason of the above alleged, such U.S. Treasury Bills in the amount of $250,000.00 were pledged with the bank as collateral for the December 30, 1952, $250,000.00 loan to ICT Insurance. The actions of the Republic Bank, therefore, again constituted a part of the existing conspiracy and further aided and abetted same. Defendants Ben Jack Cage and Francis J. Knoll knew that ICT In-

surance was insolvent and was not in a good liquid financial condition and it was necessary to create fictitious, false, and watered assets and to enter into transactions to show [fol. 142] a better liquid condition in order that a renewal of ICT Insurance Company's Certificate of Authority could be obtained. They knew that when the U.S. Treasury Bills in the amount of $250,000.00 were carried as an asset in ICT Insurance Company's books and annual statement, that ICT Insurance could not use this asset to meet its obligations because such U.S. Treasury Bills were pledged as collateral with the Republic Bank. These defendants devised this scheme and carried it out with the aid of the Republic Bank as a year-end window dressing proposition. Such fraudulent acts of Ben Jack Cage and Francis J. Knoll were a breach of such officers' fiduciary duty to ICT Insurance. By such acts of the Republic Bank, the Republic Bank joined, aided, and abetted such officers and/or directors in such breach of their duty to ICT Insurance. By this false and fraudulent actions, defendants Ben Jack Cage, Francis J. Knoll and the Republic Bank aided, abetted, and furthered the conspiracy.

137.

In the alternative, the Receiver alleges that by such fraudulent acts of the Republic Bank in joining and aiding Ben Jack Cage and the other defendants in representing in ICT Insurance Company's annual statement as of December 31, 1952, that ICT Insurance was not indebted to the Republic Bank, and the U.S. Treasury Bills were free and unencumbered, the Republic Bank is estopped from contending otherwise, and when the Republic Bank accepted the $250,000.00 of cash assets of ICT Insurance in repayment of such loan, such acts of the Republic Bank constituted a conversion and misappropriation of cash assets of ICT Insurance in such amount of $250,000.00, for which the Receiver herein sues to recover on behalf of ICT Insurance and its claimants, creditors, policyholders, and stockholders.

[fol. 143] 138.

Some time prior to August 1952, Ben Jack Cage, Nile E. Ball, and John G. Vaughan hit upon the scheme of organizing a finance company under labor control and through such labor-controlled company, develop and obtain the finance business of union members. A part of the scheme was to have such new corporation execute to these defendants, a management contract, whereby these defendants, through Jack Cage and Company of Texas, of which they were the majority stockholders, would get a percentage of the profits of such finance company. It was further their plan and scheme not to use their own individual assets to organize a new corporation but to use the assets of ICT Insurance Company and to make ICT Insurance the principal and controlling stockholder in order through such means, the union members, who were stockholders in ICT insurance and other union members, would be induced to do business with such new finance company.

139.

Such plan and scheme was carried out in the following manner: On the 5th day of August 1952, the Charter of ICT Discount Corporation was obtained from the Secretary of State of the State of Texas. The original incorporators and directors were Ben Jack Cage, Nile E. Ball, and John G. Vaughan. The number of the original authorized stock was 100,000 shares of common stock with a par value of 10¢ per share and 21,000 shares of Preferred Stock without nominal or par value. The entire amount of 100,000 shares of common stock was subscribed and paid for by ICT Insurance paying into ICT Corp. $10,000.00 and 2,100 shares of the 21,000 shares of Preferred Stock were subscribed and paid for by ICT Insurance by paying into ICT Corp. the amount of $25,200 for such preferred shares; such [fol. 144] shares were purchased by ICT Insurance on August 4, 1952, by the issuance of a check by ICT Insurance, signed by John G. Vaughan, Vice-President of ICT Insurance.

140.

On such date of August 4, 1952, ICT Insurance set up in its books the ownership of the 100,000 shares of common stock of ICT Corp. at a value of $10,000.00 and the ownership of 2,100 shares of the preferred stock of ICT Corp. at the value of $25,200.00. ICT Insurance carried stock of ICT Corp. in its books and in its annual statement as of December 31, 1952, as an asset at the value of $35,200.00 as will hereinafter be alleged. Up until 1955, ICT Insurance continued to carry ICT Corp. stock as an admissible asset in its books, published statements, and annual statements. As hereinbefore alleged, under Article 2.10 of the Texas Insurance Code, before the stocks of a private corporation could be carried as an admissible asset for statement purposes in an insurance company, such private corporation must have been in existence for a period of five years, must have paid dividends for a period of five years and shall not have defaulted in any of its obligations for a period of five years. As will hereinafter be alleged, at and during the times that such stock was carried as an admissible asset in ICT Insurance Company's annual statements and published statements, these defendants and the other officers and directors knew and/or are charged with knowledge of the law that such stock was not an admissible asset for statement purposes of ICT Insurance.

141.

The annual statement of ICT Insurance as of December 31, 1952, was prepared under the direction and supervision of the Officers and Directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by John G. Vaughan, Vice-President, Francis J. Knoll, Secretary, and Francis J. Knoll, Treas-
[fol. 145] urer, and was filed with the Board in Austin, Travis County, Texas. The annual statement contained at least the following false statements:

(a) On page 22, under schedule D, part 2, "Stocks Owned," and on page 2, it was stated that ICT Insurance owned 8,713 shares of the capital stock of ICT Life at a

value of $236,996.35, when in truth and in fact, such stock was not an admissible asset and was not worth such value.

(b) On page 22, under schedule D, part 2, "Stocks Owned," and on page 2, it was stated that ICT Insurance owned 21,000 shares of ICT Corp. preferred stock, with a market value of $25,200, and ICT Corp. common stock in the amount of 100,000 shares at a market value of $10,000.00, when in truth and in fact, such stock was not an admissible asset.

(c) On page 21, under schedule D, part 1, "Bonds Owned," and on page 2, it was stated that ICT Insurance owned free and clear of any encumbrance, U.S. Treasury Bills at the value of $1,100,000.00 when, in truth and in fact, as hereinbefore alleged, such U.S. Treasury Bills were pledged with the Republic Bank as security for the balance owing under the $920,000.00 loan to Ben Jack Cage and/or JACCO of Texas and the $250,000.00 loan to ICT Insurance.

(d) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that as of December 31, 1952, ICT Insurance did not owe any amount for borrowed money when, in truth and in fact, the $920,000.00 loan entered into between the Republic Bank and JACCO of Texas and/or Ben Jack Cage was, in effect, a loan to ICT Insurance and should have been listed as a liability to the extent of the unpaid balance on December 31, 1952, in the amount of $720,000.00.

(e) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that as of December 31, 1952, ICT Insurance did not owe any amount for borrowed money when, in truth and in fact, as hereinbefore shown, on De- [fol. 146] cember 30, 1952, ICT Insurance was caused to execute its note to the Republic Bank in the amount of $250,000.00, which note was outstanding and owing as of December 31, 1952.

(f) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that as of December 31, 1952, the total liabilities of ICT Insurance were $3,828,585.12, when in truth and in fact, such liabilities were greater in the

amount of $586,091.82 by reason of the fact that ICT Insurance Company's surplus notes in the amount of $586,091.82 which were issued in connection with the purchase of Continental Fire stock were still outstanding and were not listed as a liability.

(g) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that ICT Insurance had only a total liability of $3,828,585.12, when in truth and in fact, by virtue of the false and fictitious reinsurance treaties entered into as between ICT Insurance and Lloyds of London and the other insurance companies using Continental Union as a foil, ICT Insurance was not entitled to take credit for the unearned premium reserve and loss reserve, and therefore, under such treaty and through such fraudulent transaction, the net liabilities of ICT Insurance were falsely decreased by the amount of $2,096,584,33.

(h) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that ICT Insurance had a surplus as regards policyholders in the amount of $2,506,420.90, when in truth and in fact, ICT Insurance did not have such amount of surplus. As hereinbefore shown, when the reinsurance treaty was entered into as between ICT Insurance and Lloyds of London and the other foreign insurance companies through the use of Continental Union as a foil, ICT Insurance in its books showed that it allegedly paid Continental Union $1,720,681.43 on such reinsurance treaty, when in truth and in fact, ICT Insurance did not pay such amount to Continental Union but the securities represented [fol. 147] by such amount received by ICT Insurance were delivered over to or handed over to Leadenhall Corporation. By such transaction, ICT Insurance in the entries on its books as between it and Continental Union, was enabled to take credit for the $1,720,681.43; that credit was reflected in ICT Insurance Company's books and in its annual statement as of December 31, 1952, as a decrease of a reinsurance balance payable to Continental Union, the effect of such false entries being a decrease of ICT Insurance Company's liabilities in such amount. Therefore, in truth and in fact, ICT Insurance had $1,720,681.43 less surplus than the amount shown in the annual statement.

(i) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a total surplus as regards policyholders in the amount of $2,506,427.90, when in truth and in fact, ICT Insurance did not have this amount of surplus. As hereinbefore shown, since the treaties as between ICT Insurance and Continental Union were a subterfuge and by reversing the entries as between Continental Union and ICT Insurance, the net result would be a receivable from Continental Union to ICT Insurance in the amount of $447,869.01; that since such amount was not collectible from Continental Union, such receivable in such amount would be nonadmitted or deducted from the surplus of ICT Insurance and would thereby reduce the surplus represented in such annual statement in such amount of $446,869.01.

(j) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that ICT Insurance had a liability for losses in the amount of $478,652.90, when in truth and in fact, this liability was greater in the amount of $883,663.63 by reason of the fact that under the so-called Reinsurance treaty as between Continental Union and ICT Insurance, not only did ICT Insurance cede the losses coming within the terms of such fictitious treaty occurring subsequent to August 22, 1952, but also ceded the losses occurring prior [fol. 148] to that date.

(k) On page 4, under "Underwriting and Investment Exhibit Statement of Income," it was stated that ICT Insurance had a net underwriting gain of $6,483.83, when in truth and in fact, ICT Insurance had a net loss in the approximate amount of $195,000.00. The false statement of showing that ICT Insurance made a net underwriting profit of $6,483.83 was accomplished through false bookkeeping entries by which $201,847.64 of underwriting expenses was transferred to stock sales expenses and recorded on page 4, under "Capital and Surplus Account," as a surplus loss.

(l) On page 3, under "Liabilities, Surplus, and Other Funds," it was stated that ICT Insurance had a capital of $1,400,000.00 and unassigned funds or surplus in the amount of $1,106,427.90, or a surplus as regards policyholders in the total amount of $2,506,427.90, when in truth and in fact,

ICT Insurance had no capital and had no surplus and was hopelessly insolvent.

142.

During the year 1952, and at the time the December 1952 annual statement of ICT Insurance was prepared, and at the time said statement was submitted to the Board of Insurance Commissioners, the following defendants were officers and/or directors and/or trustees of ICT Insurance: Nile E. Ball, Ben Jack Cage, John G. Vaughan, Francis J. Knoll, Freeman Everett, William J. Harris, Marcus Loftis, Kenneth Mabry, M. M. McKnight, J. A. McMahon, Jr., Paul C. Sparks, William A. Cullen, W. S. East, Eddie Gross, P. C. Klein, Fred Lucas, W. C. McMasters, C. R. Saunders, L. A. Townsend, Walter Wideman, Vernon Evans, Ray Johnson, Walton N. Newman, Frank Owens, Claude Ritchie, Bill Sams, George Webber, Ed Weimar, T. W. Wheeler, C. O. Blackburn, Stanley E. Prichard, [fol. 149] Charlott Morgan Graham, W. A. Combs, William V. Barker, Albert Boggess, Walter Monroe, L. "Bud" Laird, Arthur Noble and Gaines R. Terrell. At the time that these false, fraudulent, and fictitious financial transactions were entered into, and at the time that the false statements were made in the annual statement, and at the time that such annual statement was submitted to the Board of Insurance Commissioners, each of these defendants either participated in such fraudulent transactions and/or knew and/or were charged with knowledge of the fraudulent aspects of such financial transactions and that some or all of such statements were false, or as officers and/or directors, they negligently and carelessly permitted such fraudulent and fictitious transactions to be entered into and such false statements to be made and submitted to the Board, when with ordinary care in exercising their care, and as officers or directors, they could have, and should have known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made, with the intent that the same should be submitted to the Board of Insurance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a certificate, certifying that ICT In-

surance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1953. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a certificate of such compliance would be circulated as required by law, and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders, and stock subscribers that ICT Insurance had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and [fol. 150] these classes of persons, and was breach of such officers' and directors' fiduciary duty to ICT Insurance, and were a part of, and in furtherance of, and in aid of the conspiracy; that by the hereinabove alleged acts of the persons and entities, hereinbefore named, other than such officers and directors in entering into, aiding, participating, and joining in the fraudulent acts hereinbefore alleged, which were entered into to fictitiously increase ICT Insurance Company's assets and fictitiously lower its liabilities, such persons joined in, aided, and abetted the officers and directors in the making of such false and fraudulent December 31, 1952 annual statement of ICT Insurance, and thereby aided and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance; all of which acts were a part of and in furtherance of and in aid of the conspiracy. The false statements in ICT Insurance Company's annual statement and submitted by its officers to the Board were statements made directly to the Board, were statements made as to material facts, and was, and were, relied upon by said Board as the truth, and did cause the Board to issue a Renewal Certificate of Authority to ICT Insurance to continue to do business in 1953, together with a certificate of Publication which was published in two newspapers of wide circulation as required by law.

143.

To further the conspiracy, some time during the year 1953, after the annual statement was prepared and filed,

and at an exact date well known to the defendants, a financial statement of ICT Insurance in pamphlet form was prepared and widely distributed to the existing and prospective creditors, claimants, insurance agents, and policyholders of ICT Insurance. On one portion of the pamphlet was a financial statement showing ICT Insurance Company's assets and liabilities as of December 31, 1952, to be the same as shown on pages 2 and 3 of ICT Insurance Company's December 31, 1952 annual statement [fol. 151] and showing a capital of $1,400,000.00 unassigned surplus and $1,106,427.90 or a combined policyholder surplus of $2,506,427.90. The assets and liabilities used to make up such pamphlet statement to show such capital and surplus were false for the same reason as hereinbefore shown that they were false in the December 31, 1952 annual statement of ICT Insurance. On one side of the financial pamphlet was a "Report to Stockholders, Agents and Policyholders," signed by Ben Jack Cage, which stated:

> "The growth of the ICT Group of companies during 1952 dramatically demonstrated that, given a chance, people can and will do business with themselves.
>
> You have proved it, and our records of achievement reflect that proof.
>
> Our agents have increased more than 1,500 per cent. Our premium income has nearly trebled. Our operating territory has expanded from two to 17 states. The number of people working to serve you has more than doubled.
>
> Such progress has been possible only through the enthusiastic reception you have given your own companies and the teamwork you have displayed in building a firm foundation for the ICT Group. We are proud, too, of the recognition given us in the nation's press and by business circles throughout the country.
>
> Now we must take out an insurance policy on our progress. If the ICT Group is to grow as we know it will, we must plan our program on a five-year period of development. During this time we naturally cannot expect a dividend. Our profits will be ploughed back into the business so that we can broaden, solidify and consolidate our gains for your benefit.

As we look to the future, we will be forging ahead to new heights, new records, new public recognition. We are certain that the years ahead will find more and more of the 16,000,000 union members in America willing and eager to do business with themselves and to help us build a better America. Enthusiastic Regards, /s/ Ben Jack Cage."

On one side of the statement it was stated: "Owned by Union Members Building a Better America," and listed the officers and directors.

144.

At the time that these financial pamphlets were made and published, each of the defendants who as hereinbefore al- [fol. 152] leged were officers and directors, knew that the statements were false, or as officers and/or directors, they negligently and carelessly permitted such false statements to be made and published, when with ordinary care in exercising their duties as officers and/or directors, they could have, and should have, known the true facts. These defendants made and published, caused to be made and published, or negligently permitted to be made and published, the statement with their names thereon with the purpose and intent that such statement be relied upon by existing and prospective innocent policyholders, creditors, and stockholders to induce them to invest in ICT Insurance and to extend to ICT Insurance credit. These false representations in such pamphlets were made as to material facts and were relied upon by the classes of persons to whom they were made. Such wrongful acts were wrongs as against ICT Insurance and its claimants, creditors, stockholders, and policyholders, by reason of the fact that pursuant to such wrongful acts. ICT Insurance was caused to incur liabilities and obligations that it could not meet. Such wrongful acts by such defendants were a breach of their fiduciary duty to ICT Insurance. Likewise, all the defendants as hereinbefore alleged who participated in the false and fraudulent financial manipulations in aid of the creation of the fictitious assets and concealment of liability through such acts as hereinabove alleged, aided such officers and

directors in the breach of their fiduciary duty in connection with the publication and issuance of such false financial pamphlets. All of such fraudulent acts of such defendants aided, abetted, and furthered the conspiracy and became a part thereof.

145.

As hereinbefore shown, as of December 31, 1952, ICT Insurance was hopelessly insolvent. During the year 1953, ICT Insurance was caused to continue to sell and issue its insurance policies, thereby creating additional liabilities on unearned premium reserves and loss reserves that had to [fol. 153] be maintained. Therefore, in order to show that ICT Insurance had sufficient assets to meet its liabilities and to show a solvent financial condition during the year 1953, additional fraudulent, illegal transactions and manipulations were entered into; all of which were in furtherance of the conspiracy to show ICT Insurance solvent and in a position to pay its liabilities and therefore enable it to continue to operate when, in truth and in fact, ICT Insurance was in a hopelessly insolvent condition.

146.

To further the conspiracy, and in order to create assets and surplus of ICT Insurance in its books as of December 31, 1953, the following transaction was entered into as between ICT Insurance, Jack Cage and Company of Texas and Alamo Motor Lines. In 1953, Alamo Motor Lines was a subsidiary of ICT Corp. and at this time, ICT Corp. was a subsidiary of ICT Insurance. Ben Jack Cage was President of ICT Insurance, ICT Corp. and Alamo Motor Lines. Frank G. Newman was the general counsel for Jack Cage and Company and the ICT Corp. A plan and scheme was devised whereby a supposed First Mortgage Loan would be made by ICT Insurance to Alamo Motor Lines, which loan by ICT Insurance to Alamo Motor Lines would be secured by a deed of trust on the property and terminals of Alamo, which property was located in the Counties of Bexar, Caldwell, Kerr, Ector, Pecos, Upton, Persidio, Tom Green, and Harris. A part of such scheme and plan was that such loan by ICT Insurance was to be in the amount

of $146,308.51, of which amount, $13,480.65 was to be used to pay off an existing lien on the property located in Bexar County and the balance of $132,827.86 would be used for the alleged purpose of purchasing stock of ICT Insurance and thereby obtain additional funds in ICT Insurance for the December 31, 1953, statement purposes.

[fol. 154]

147.

Under Article 2.10 of the Insurance Code, before a first mortgage could be carried as an admissible asset, such law required that such mortgage be a first mortgage on unencumbered real estate in the State of Texas and that such real estate shall be worth at least 40 per cent more than the amount loaned thereon. Furthermore, such law required that the value of such real estate shall be determined by a valuation under oath by two freeholders of the County where the real estate is located. This plan and scheme was carried out in violation of such laws, in the following manner.

148.

Tentative appraisals were obtained by Frank G. Newman from various individuals as well as the descriptions of the various pieces of property in the various counties. Based upon these values obtained, two appraisals were prepared by Frank G. Newman on each of the pieces of property in both of which appraisals Frank G. Newman inserted the same value as being the appraised value of the land and the buildings on such land. These appraisals, together with a cover letter on December 3, 1953, were sent by Frank G. Newman to T. W. Wheeler in San Antonio, the home office of Alamo Motor Lines. In such letter, Frank G. Newman advised T. W. Wheeler that he had prepared and was enclosing appraisal forms for each of the properties. T. W. Wheeler was requested to have each of the forms signed by freeholders of the County referred to in the form. He further advised Wheeler that the freeholder may be an employee of his, such as a station agent or any other person. T. W. Wheeler was further advised by Frank G. Newman that they were anxious to conclude the matter during the coming week and if it were possible for T. W. Wheeler to

put these forms on the trucks of Alamo Motor Lines and [fol. 155] get them signed by these people and return them within the next few days. In due course, such appraisals were signed by various employees, agents of Alamo Motor Lines, and other people and were returned to ICT Insurance and held by ICT Insurance as appraisals to back up such loan as required by Article 2.10 of the Insurance Code. On December 21, 1953, ICT Insurance issued its check to the Mercantile Bank in the amount of $13,480.65 to pick up a draft drawn by the National Bank of Commerce of San Antonio, Texas, on ICT Insurance, in payment of the real estate note on the Bexar County property. On December 22, 1953, ICT Insurance issued its check to Alamo Motor Lines in the amount of $132,827.86, both of which checks totalling $146,308.51, supposedly representing the loan to Alamo Motor Lines in exchange for Alamo's first mortgage note secured by the deed of trust on the property hereinabove referred to. On or about such date, a Real Estate Note secured by a deed of trust on such property was executed by Alamo Motor Lines to ICT Insurance. ICT insurance set up in its books such real estate note and deed of trust as an asset in the amount of $146,308.51. Such real estate note was carried in ICT Insurance Company's annual statement as of December 31, 1953, at the value of $146,308.51, showing a par value or an appraised value of $243,847.52, such par value being based upon the appraisals as hereinbefore alleged. Receiver alleges that upon information and belief, the $132,827.86 found its way into JACCO of Texas, and as part of the plan as hereinbefore alleged, such amount of money was used by JACCO of Texas for the purchase of 8,301 shares of ICT Insurance stocks.

[fol. 156] 149.

As hereinbefore alleged, the law required that such first mortgage, before it could be carried as an asset, must be a first lien upon unencumbered property in the State of Texas, and such property must be worth 40 per cent more than the loan thereon. At the time that such transaction was entered into, Frank G. Newman and Ben Jack Cage

knew and were charged with knowledge that certain of such property was encumbered and that such property was not worth more than 40 per cent more than was loaned thereon. Furthermore, as hereinbefore alleged, before such mortgage could be carried as an admissible asset, such mortgage must be backed up by the appraisals of the valuation made under oath by two freeholders of the County where the real estate is located. Ben Jack Cage and Frank G. Newman knew that such mortgage was not backed up by appraisals of two freeholders made under oath as to the value of such property because as hereinbefore alleged, such appraisals and valuations were prepared by Frank G. Newman and the officers of Jack Cage and Company of Texas and were distributed to the agents, employees of Alamo Motor Lines, and other persons in the Counties where such properties were located and were executed by such persons. These defendants therefore knew that such valuations did not represent the independent judgment of such freeholders. Furthermore, such alleged freeholders and appraisers being agents and employees of Alamo through the employer-employee relationship were more or less obligated by virtue of such position to be relegated into accepting the valuation placed upon such properties as set forth in such appraisals in lieu of their own independent judgment. These defendants entered into such transaction and obtained these fictitious appraisals in order that upon the face of such transaction, it could be falsely represented that ICT Insurance had complied with the law and that the first mortgage was an admissible asset, and further, in order that a part of the proceeds of such transaction could be used to feed back into [fol. 157] ICT Insurance through the stock purchase transaction in order to give to ICT Insurance additional surplus for statement purposes. Through such fraudulent acts, Ben Jack Cage breached his fiduciary duty to ICT Insurance and Frank G. Newman, JACCO of Texas and ICT Corp. joined and aided such officers and directors in such breach of duty and through such transaction, these defendants joined in, aided, abetted, and furthered the conspiracy.

150.

Some time in August 1953, negotiations were commenced as between Ben Jack Cage, President of ICT Insurance, on the one hand, and T. K. Irwin, Sr., T. F. Keasler and others on the other, for the purchase of an office building located on the corner of Commerce and Ervay Streets, downtown Dallas, known as the Irwin-Keasler Building. In connection with such prospective purchase, Ben Jack Cage obtained an appraisal of the value of such property from MacKie and Kamrath, architects. Such firm, through F. J. MacKie, Jr., on the 19th day of August 1953, appraised such building and land at the approximate value of $1,850,000.00.

151.

In connection with the plans to purchase such building, a scheme was devised whereby upon its purchase, such building could be carried as an asset of ICT Insurance in the amount of $152,500.00 more than what was actually paid for such property and more than what such property was actually worth, and through such means, falsify the books and annual statements of ICT Insurance by showing that ICT Insurance had assets in such amount of $152,500.00 more than it actually had. Through such transaction, Ben Jack Cage, JACCO of Texas, United Metropolitan Corporation, and Commercial and General misappropriated and converted $152,500.00 of ICT Insurance Company's assets which were used by Ben Jack Cage for his own use and benefit.

[fol. 158]

152.

In order to carry the value of such building as an asset in ICT Insurance in an amount greater than was to be paid to Irwin and Keasler, the sellers, a scheme was devised to organize a private corporation using ICT Insurance Company's money for the incorporation of such company and then to have such company to supposedly purchase such building using ICT Insurance Company's money as the down-payment and then after such alleged purchase, then to obtain an appraisal in an amount greater than

what was paid to the sellers for such building and then to allegedly resell such building to ICT Insurance at such greater amount and thereby through such subterfuge carry such building at the increased appraised value. This scheme was carried out in the following manner:

153.

On the first day of October 1953, Ben Jack Cage, Frank G. Newman, and Francis J. Knoll caused to be incorporated United Metropolitan Corporation, a Delaware corporation, with a capital of ten shares of stock at a par value of $100.00 per share, or a total capital of $1,000.00. The entire ten shares of stock representing the capital of $1,000.00 was paid and subscribed by ICT Insurance. After such incorporation, Frank G. Newman was elected President, Francis J. Knoll was elected Secretary-Treasurer, and Ben Jack Cage, Frank G. Newman and Francis J. Knoll were elected Directors. On October 3, 1953, an agreement was entered into by and between United Metropolitan Corporation by Frank G. Newman, President, on the one hand; and T. K. Irwin, Sr., and T. F. Keasler and others on the other, for the alleged sale of the Irwin-Keasler building to United Metropolitan Corporation for a total cost of $1,812,500.00. It was agreed that such consideration of $1,812,500.00 was to be paid by United Metropolitan Corporation paying to the sellers $250,000.00 in cash and the assumption [fol. 159] of an outstanding first lien owing by the sellers to Equitable Life Insurance Company of Des Moines, Iowa, in the amount of $563,566.20 and the execution by United Metropolitan of a note secured by a second lien on such property in the amount of $998,933.80.

154.

On October 5, 1953, a contract was entered into between United Metropolitan Corporation by Frank G. Newman, its President, and ICT Insurance by John G. Vaughan, its Vice-President, whereby it was agreed that ICT Insurance would purchase such property from United Metropolitan Corporation at a purchase price based upon an appraisal to be obtained from the Real Estate Board of the City of

Dallas. It was agreed that such purchase price based upon such appraisal that would be paid by ICT Insurance to United Metropolitan for such building, would be the assumption by ICT Insurance of the first lien indebtedness owing on said property to Equitable Life Insurance Company of Des Moines in the principal amount of $563,566.20; and the assumption by ICT Insurance of the second lien indebtedness in the principal amount of $998,933.80 owing by United Metropolitan to T. K. Irwin, Sr., and T. F. Keasler and the other original sellers, and the balance of such purchase price to be payable in cash or in surplus notes of ICT Insurance.

155.

As hereinabove alleged, the purchase price that ICT Insurance was to pay to United Metropolitan for the Irwin-Keasler building was to be based upon an appraised value that would be obtained from the Dallas Real Estate Board; that in order to obtain from the Dallas Real Estate Board an appraisal in an amount greater than the $1,812,500.00, the price that United Metropolitan had just contracted to purchase the property for, a scheme was devised and entered into by and between Ben Jack Cage, Frank G. Newman, J. N. Fisher and T. K. Irwin, Sr., whereby J. N. Fisher, a realtor in the City of Dallas, would be used as a front in representing to the Dallas Real Estate Board that [fol. 160] he had an undisclosed insurance company which was purchasing the Irwin-Keasler building at a value of $2,500,000.00; such scheme was carried out by J. N. Fisher making such representation to the Dallas Real Estate Board and by T. K. Irwin furnishing blueprints and other information concerning such building to such appraisers and not disclosing the fact that United Metropolitan had just purchased such building for the total consideration of $1,812,500.00. Through such misrepresentations and concealments, the Dallas Real Estate Board on the 10th day of October 1953 issued its certification of valuation to J. N. Fisher appraising such property at the fair market value as of October 7, 1953, at the value of $1,965,000.00.

156.

On October 27, 1953, the Irwin-Keasler building was transferred to United Metropolitan Corporation by a deed executed by T. K. Irwin, T. F. Keasler and the other sellers for the total consideration agreed upon in the amount of $1,812,500.00, with the $250,000.00 cash consideration paid by United Metropolitan to such sellers being furnished by ICT Insurance. On November 2, 1953, United Metropolitan conveyed such property to ICT Insurance for the total consideration of $1,965,000.00, being the amount of the appraisal obtained from the Dallas Real Estate Board. Under the agreement of October 5, 1953 between ICT Insurance and United Metropolitan Corporation, ICT Insurance paid to United Metropolitan Corporation the $1,965,000.00 by assuming the first lien of $563,566.20 and the second lien in the amount of $998,933.80 and the cash consideration of $250,000.00 by cancelling the indebtedness from United Metropolitan Corporation to ICT Insurance that arose by ICT Insurance furnishing the $250,000.00 cash consideration paid to the original sellers and by executing ICT Insurance Company's surplus note to United Metropolitan Corporation in the amount of $152,500.00.

[fol. 161] 157.

The Irwin-Keasler building was placed on the books of ICT Insurance as an asset in the amount of $1,965,000.00 and was likewise carried in the December 31, 1953 annual statement at such value. The surplus note issued by ICT Insurance was not carried as a liability of $152,500.00 in the December 31, 1953 annual statement. Through such fraud, concealment and misrepresentations, ICT Insurance showed in its annual statement as of December 31, 1953, $152,500.00 of assets more than it actually owned.

158

That such fraudulent, wrongful, and illegal acts committed by Ben Jack Cage and Francis J. Knoll were in breach of such officers' and/or directors' fiduciary duty to ICT Insurance, and by the acts of Frank G. Newman, J. N.

Fisher, and T. K. Irwin, Sr., in joining in and aiding in such transaction, such defendants joined in, aided, and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance; all of which acts of such defendants were in furtherance of and aided and abetted the conspiracy of creating fictitious assets and hiding liabilities of ICT Insurance in order to keep ICT Insurance operating in violation of law although ICT Insurance was insolvent.

159.

In May 1954, Ben Jack Cage and Francis J. Knoll hit upon a plan and scheme to get cash assets out of ICT Insurance in the amount of $152,500.00 representing the amount allegedly due by ICT Insurance to United Metropolitan Corporation on ICT Insurance Company's surplus note to United Metropolitan Corporation, in order that Ben Jack Cage could use such money for his own personal and individual benefit and/or the benefit of Jack Cage and Company of Texas. The plan originally devised was to have ICT Insurance pay off such alleged surplus note in the amount of $152,500.00 to United Metropolitan Corporation and then for United Metropolitan Corporation to [fol. 162] loan such amount of cash to Jack Cage and Company of Texas. On June 22, 1954, such scheme was carried out by such defendants by their having ICT Insurance issue its check No. A-2299 to United Metropolitan Corporation for the alleged purpose of paying off such surplus note. On the same date, these defendants had United Metropolitan Corporation loan such amount of $152,500.00 to JACCO of Texas by issuing United Metropolitan's check in the amount of $152,500.00 to JACCO of Texas. By reason of the fact that such a loan was in effect a loan by ICT Insurance to Ben Jack Cage, its officer and director, and the law prohibited an insurance company making a loan to its officers or directors, such scheme was too obviously in violation of law and was abandoned. JACCO of Texas repaid such loan and another scheme was entered into between Ben Jack Cage, Francis J. Knoll and Frank G. Newman in order to get such $152,500.00 into JACCO of Texas and other subsidiaries owned or controlled by Ben Jack

Cage. This scheme was engineered and carried out by such $152,500.00 being transferred to JACCO of Texas, which money JACCO of Texas and/or Ben Jack Cage used for their own personal use and benefit.

160.

All of such acts surrounding the purchase of the Irwin-Keasler building by ICT Insurance at the inflated value of $152,500.00, and the taking out of ICT Insurance of the amount of $152,500.00 in connection with such transaction as hereinbefore alleged, all constituted a conversion, misappropriation and theft of ICT Insurance Company's funds in the amount of $152,500.00 by Ben Jack Cage, Frank G. Newman, Francis J. Knoll, J. N. Fisher, T. K. Irwin, Sr., and JACCO of Texas, for which amount the Receiver herein sues to recover from such defendants on behalf of ICT Insurance and its claimants, creditors, policyholders and stockholders.

[fol. 163] 161.

As hereinbefore alleged, in order to hide liabilities of several millions of dollars in unearned premium reserve and loss reserve and thereby show a false picture of solvency of ICT Insurance in its books and also in its annual statement as of December 31, 1952, the fictitious bankers type reinsurance treaty was entered into as between ICT Insurance and Lloyds of London and other foreign companies using Continental Union as a foil on August 22, 1952, and was in existence until March 1953. On or about March 1953, another scheme was devised and carried out whereby such bankers type reinsurance treaty as between ICT Insurance, Continental Union and Lloyds of London was cancelled as to Lloyds of London and the other foreign companies and the treaty between ICT Insurance and Continental Union was permitted to continue and other fictitious treaties were entered into. Since Continental Union was supposedly carrying the unearned premium reserve and loss reserve of ICT Insurance under the 75 per cent quota share bankers type treaty as between ICT Insurance and Continental Union, it was then necessary in order to show Continental

Union in a solvent position, for Ben Jack Cage and Francis J. Knoll to cause Continental Union to enter into fictitious reinsurance contracts with other Ben Jack Cage-controlled companies, Commercial and General and La Comercial. On June 30, 1953, Ben Jack Cage caused ICT Insurance to amend its 75 per cent bankers type reinsurance treaty whereby ICT Insurance had ceded 75 per cent of its liability to Continental Union since August 22, 1952, to eliminate Fire and Allied Lines. On June 30, 1953, a 50 per cent bankers type quota share treaty was entered into between ICT Insurance and Continental Union whereby ICT Insurance allegedly ceded to Continental Union 50 per cent of its unearned premium and outstanding losses on Fire and Allied Lines. On this same date, Continental Union was caused to enter into an alleged reinsurance contract with Commercial and General whereby Continental [fol. 164] Union ceded 75 per cent of its casualty business to Commercial and General that Continental Union had assumed from ICT Insurance, and also on the same date, Continental Union entered into a bankers type quota share reinsurance treaty with Commercial and General whereby Continental Union allegedly ceded 100 per cent of the Fire and Allied business that Continental Union had received from ICT Insurance, and in turn, Commercial and General retroceded this fire business 100 per cent to La Comercial. For the period September 30, 1953, to March 31, 1954, Ben Jack Cage and Francis J. Knoll caused Continental Union and ICT Insurance to enter into another bankers type reinsurance treaty with Lloyds of London and The London and Edinburgh Insurance Company, Ltd., under which treaty Continental Union was caused to cede 50 per cent of the casualty business that Continental Union had allegedly assumed from ICT Insurance. Such treaty as between Continental Union, Lloyds of London, The London and Edinburgh Insurance Company, Ltd., and ICT Insurance, was a bankers type quota share treaty in connection with which ICT Insurance reinsured Lloyds of London and The London and Edinburgh Insurance Company, Ltd., on a stop-loss basis guaranteeing a loss ratio under the bankers type quota share reinsurance from Continental Union to Lloyds of London and The London and Edinburgh Insur-

ance Company, Ltd., not exceeding 70 per cent. Therefore, the effect of this bankers type quota share treaty between Continental Union, ICT Insurance, Lloyds of London and The London and Edinburgh Insurance Company, Ltd., was to guarantee Lloyds a 5 per cent profit on the earned premiums ceded under such alleged agreement and ICT Insurance further guaranteed Lloyds of London and The London and Edinburgh Insurance Company, Ltd., in connection with the risk above, a 70 per cent loss ratio so as to eliminate any loss whatsoever to Lloyds of London and The London and Edinburgh Insurance Company, Ltd. On December 30, 1953, the bankers type quota share reinsurance treaty as between ICT Insurance and Continental [fol. 165] Union and Continental Union cessions to Commercial and General and Commercial and General retrocessions to La Comercial were amended so as to allow ICT Insurance and Continental Union to allegedly cede ICT Insurance Company's unearned premium and loss reserve to Guardian Insurance Company of Sioux Falls, South Dakota. To carry out such scheme, on December 30, 1953, the bankers type quota share reinsurance treaty between ICT Insurance and Continental Union was amended so as to cause ICT Insurance to cede to Continental Union 50 per cent of its business after a 25 per cent cession to Guardian Insurance Company. In other words, on December 30, 1953, ICT Insurance was allegedly ceding 25 per cent of its unearned premiums and losses to Guardian Insurance Company, and after deducting such reinsurance from its entire portfolio, allegedly ceded 50 per cent of the remaining unearned premium reserves and loss reserves to Continental Union. Continental Union, on December 30, 1953, amended its bankers type quota share treaties with Commercial and General so as to enable Continental Union to allegedly cede to Guardian Insurance Company and also to give effect to the bankers type quota share treaties with Lloyds of London and The London and Edinburgh Insurance Company, Ltd., which was in effect for only a temporary period over the year-end. To record the amendments of these treaties, Continental Union entered in its books and annual statement as of December 31, 1953, an alleged cession of 75 per cent to the Guardian Insurance Company

and an alleged 50 per cent cession to a so-called Pool Number 1. Continental Union entered in its books the 50 per cent cession to Pool Number 1 before the 75 per cent bankers type quota share alleged cession to Guardian. Of the 50 per cent alleged cession to Pool Number 1, a portion of such percentage was allegedly ceded to Commercial and General and the remainder was allegedly ceded to Lloyds of London and The London and Edinburgh Insurance Company, Ltd., under the bankers type quota share treaties hereinbefore alleged. Effective December 30, 1953, [fol. 166] ICT Insurance entered into a stop-loss reinsurance agreement with Guardian Insurance Company whereby ICT Insurance guaranteed Guardian Insurance Company no loss on the 75 per cent cession Guardian had allegedly assumed from Continental Union, and on the same date, Continental Union entered into a stop-loss agreement with Guardian, guaranteeing Guardian no loss on the 25 per cent assumption that Guardian had allegedly assumed from ICT Insurance. The net effect of such stop-loss treaties as between ICT Insurance and Guardian and Continental Union and Guardian was to guarantee Guardian no loss on its alleged assumptions of ICT Insurance Company's premium reserve and loss reserve that Guardian had allegedly assumed from ICT Insurance and Continental Union. By virtue of such bankers type treaties with stop-loss agreements, ICT Insurance had no coverage under such treaties for the benefit of its claimants, creditors, and policyholders, and all of such treaties were entered into for the purpose of reducing ICT Insurance Company's unearned premium reserve and loss reserve and thereby giving ICT Insurance a false picture of solvency. As of December 31, 1953, ICT Insurance was caused to show in its annual statement that it had surplus in the amount of $6,505,385.98 in excess of surplus it actually had. In other words, ICT Insurance showed in its annual statement that it had capital and surplus or a policyholder's surplus of $3,160,583.66; when in truth and in fact, ICT Insurance had no capital, no surplus, and had an additional deficit of $3,344,802.32 by reason of these fictitious reinsurance transactions alone.

162.

In connection with the 1953 year-end alleged reinsurance treaties as between Continental Union and Guardian, and ICT Insurance and Guardian, The Guardian Insurance Company was an insurance company controlled by Stuart B. Hopps through other corporate entities owned and controlled by the said Stuart B. Hopps. The Guardian Insurance Company of Sioux Falls, South Dakota, was a new [fol. 167] insurance corporation organized by Stuart B. Hopps and his associates in the fall of 1953. That in order that ICT Insurance could allegedly take full credit in its annual statement as of December 31, 1953, for the unearned premium reserve and loss reserve allegedly ceded in the reinsurance treaties as between Guardian Insurance Company, ICT Insurance and Continental Union, it was necessary that Guardian be admitted to do business in Texas prior to December 31, 1953. Furthermore, under the requirements of the insurance department of the State of Texas, before a foreign insurance corporation can be admitted to do business in Texas it must have been in business for a period of one year. The Guardian Insurance Company was not admitted to do business until February 1954. Although the Guardian Insurance Company had not been in existence for a period of one year and although Guardian was not admitted to do business in Texas until February 1954, Ben Jack Cage and Francis J. Knoll in ICT Insurance Company's annual statement as of December 31, 1953, falsely showed that ICT Insurance was entitled to and took full credit under such false and fictitious reinsurance treaties, thereby showing ICT Insurance in a solvent condition; when in truth and in fact, ICT Insurance was insolvent.

163.

Such false annual statement was submitted to the Board of Insurance Commissioners and was approved by Garland A. Smith, Chairman of the Board of Insurance Commissioners, and J. Byron Saunders, Casualty Commissioner, and based upon approval of such false annual statement, Garland A. Smith and J. Byron Saunders caused to be executed a Certificate of Authority, permitting ICT Insur-

ance to continue to operate for the ensuing year. At the time that Garland A. Smith and J. Byron Saunders approved such false annual statement and issued to ICT Insurance a Certificate of Authority for the forthcoming year based upon such false annual statement, they knew that the Guardian Insurance Company had not been in existence for a period of one year and therefore was not [fol. 168] entitled to be admitted to do business in Texas under the Board's ruling. They further knew that the Guardian Insurance Company had not been admitted to do business until February 1954, and therefore, not having been admitted to do business on or before December 31, 1953, such fictitious reinsurance treaties as between Guardian, ICT Insurance and Continental Union could not have been given effect to as of December 31, 1953, the date of ICT Insurance Company's annual statement. In order to aid Ben Jack Cage and Francis J. Knoll in falsifying ICT Insurance Company's annual statement as of December 31, 1953, to falsely show that ICT Insurance was solvent through such fictitious reinsurance treaties as between ICT Insurance, Continental Union, and Guardian, Garland A. Smith and J. Byron Saunders in the Board's order authorizing Guardian Insurance Company to do business in Texas, dated such order back, effective as of December 31, 1953. That such actions of Garland A. Smith and J. Byron Saunders were in violation of their sworn oath of office as public officials and as members of the Board of Insurance Commissioners, to the public, to ICT Insurance and its claimants, creditors, policyholders, and stockholders. That as an inducement for Garland A. Smith to violate his sworn oath of office, he continued to be given and accepted the bribes paid him by Ben Jack Cage hereinbefore alleged. That as an inducement for J. Byron Saunders to violate his sworn oath of office, in February 1954, on or about the date that the fraudulent transaction hereinabove stated was consummated, J. Byron Saunders commenced to receive a bribe in the amount of $300.00 per month, which amount of bribe was at a latter date increased to $500.00 per month, and which cash bribes totaled $7,600.00. That in addition to such cash bribes, J. Byron Saunders was given gifts by Ben Jack Cage, including an air-conditioner

for his car at the value of $348.00; that furthermore, J. Byron Saunders was given bribes by Ben Jack Cage in the form of lavish entertainment, expensive trips, and free airplane trips; that by reason of such dishonest and fraudulent acts, Ben Jack Cage and Francis J. Knoll as officers [fol. 169] and directors of ICT Insurance breached their fiduciary duties to ICT Insurance and Stuart B. Hopps, J. Byron Saunders, Garland A. Smith; Lloyds of London, The London and Edinburgh Insurance Company, Ltd., Guardian Insurance Company and Commercial and General joined, aided, and abetted such officers and directors in such breach of their fiduciary duty to ICT Insurance. Further, by such fraudulent acts, Ben Jack Cage, Francis J. Knoll, Lloyds of London, and The London and Edinburgh Insurance Company, Ltd., Guardian Insurance Company, Stuart B. Hopps and Commercial and General furthered, aided, and abetted the conspiracy; that by reason of the dishonest and fraudulent acts of J. Byron Saunders and Garland A. Smith as hereinabove alleged, and the acceptance of bribes therefor, Garland A. Smith and J. Byron Saunders violated their sworn oaths of office and joined, aided, abetted, and furthered the conspiracy; that furthermore, by virtue of such bribes paid to J. Byron Saunders, J. Byron Saunders and Ben Jack Cage jointly and in collusion converted and misappropriated such assets of ICT Insurance; that furthermore, by virtue of the payment of $17,500.00 that ICT Insurance was caused to pay to Lloyds of London and The London and Edinburgh Insurance Company, Ltd., under the false and fictitious reinsurance treaty as between ICT Insurance and Lloyds of London and The London and Edinburgh Insurance Company, Ltd., using Continental Union as a foil, Lloyds of London, The London and Edinburgh Insurance Company, Ltd., Ben Jack Cage and Francis J. Knoll jointly and in collusion converted, misappropriated, and swindled such money of ICT Insurance in such amount of $17,500.00; all of which monies the Receiver herein sues to recover.

164.

In connection with such reinsurance transactions hereinabove alleged as between ICT Insurance and Continental

Union, Continental Union was in an insolvent condition and being in an insolvent condition, could not therefore [fol. 170] carry the reserves as required under such alleged reinsurance treaties with ICT Insurance. That in order to show Continental Union in a solvent condition, fictitious financial transactions were entered into in order to show that Continental Union had sufficient capital to enter into reinsurance treaties with ICT Insurance in which millions of dollars of alleged reinsurance was involved, so that through such fictitious reinsurance transactions, it could be falsely shown that ICT Insurance was solvent as hereinabove alleged. On December 30, 1953, a check-kiting transaction was entered into as between Leadenhall Corporation, Continental Union, and JACCO of Alabama. This transaction was entered into and carried out in the following manner: On December 30, 1953, JACCO of Alabama issued its check to Continental Union in the amount of $600,000.00. On the same date, December 30, 1953, Continental Union deposited this $600,000.00 check and credited this $600,000.00 in its books as a $300,000.00 capital contribution and a $300,000.00 surplus contribution. On the same date, Continental Union issued its check to Leadenhall Corporation in the amount of $600,000.00, and on its books showed that this was a payment to Commercial and General of Tangier, North Africa, as a payment on reinsurance. On the same date, December 30, 1953, Leadenhall Corporation deposited this $600,000.00 check from Continental Union in its account. Then, on the same date, Leadenhall Corporation issued its check in the amount of $600,000.00 as an alleged loan to JACCO of Alabama, and on the same date, JACCO of Alabama deposited the $600,000.00 check from Leadenhall in its bank account and set up in its books that this $600,000.00 was an alleged loan from Leadenhall and thereby completing the check-kiting cycle. That at the time that Leadenhall Corporation, Continental Union, and JACCO of Alabama each issued their checks to each other in the amount of $600,000.00, on December 30, 1953, none of such companies had $600,000.00 in their bank accounts, and all such checks were issued on the same date and deposited on the same date in bank [fol. 171] accounts of the respective companies. Through

such fraudulent and dishonest acts of Ben Jack Cage and Francis J. Knoll in such check-kiting transactions, Continental Union was caused to falsely represent in its annual statement as of December 30, 1953, that it had such additional capitalization. Through such dishonest and fraudulent acts, these defendants aided, furthered, and abetted the conspiracy of keeping ICT Insurance operating in violation of law.

165.

In November 1953, Ben Jack Cage converted and misappropriated $37,929.63 assets of ICT Insurance in the following manner: On November 13, 1953, ICT Insurance was caused to issue its check to Continental Union in the amount of $225,000.00 for the alleged payment to Continental Union of a reinsurance balance allegedly owing by ICT Insurance to Continental Union under the fictitious reinsurance treaties hereinbefore alleged. Through financial manipulations as between Continental Union, JACCO of Alabama and Leadenhall, $37,929.63 of such $225,000.00 was converted and misappropriated by Ben Jack Cage through his controlled entities JACCO of Alabama and Leadenhall Corporation, for which amount the Receiver herein sues to recover.

166.

As hereinbefore alleged, on January 1, 1952, ICT Insurance issued its so-called surplus notes to La Comercial in the amount of $586,091.82 for the purchase of the worthless stock of Continental Fire. As hereinbefore further alleged, on the 13th day of August 1952, in connection with the Settlement Agreement as between ICT Insurance on the one hand, and Narragansett on the other, the surplus notes, along with other worthless assets in the amount of $1,720,681.43, were given to ICT Insurance in payment of the balances due ICT Insurance as agreed upon. Such transaction in effect cancelled out such surplus notes by returning them to ICT Insurance in connection with such Settlement Agreement. However, as hereinbefore alleged, [fol. 172] all of such worthless assets, including the surplus notes, were transferred on to Leadenhall, a Ben Jack Cage-

controlled entity and held by Leadenhall until June 30, 1953, at which time such assets were transferred to Continental Union, Continental Union showing on its books at that time that it had received such assets from ICT Insurance in payment of reinsurance balances, and then on the same date, transferred such assets to Commercial and General as payment by Continental Union to Commercial and General on reinsurance balances that Continental Union supposedly owed to Commercial and General for reinsurance that Continental Union had allegedly assumed from ICT Insurance and allegedly ceded to Commercial and General as hereinabove shown. Therefore, instead of cancelling such surplus notes of ICT Insurance that were outstanding, on August 13, 1952, the date that they were received on such Settlement Agreement, they were left outstanding in order not to charge ICT Insurance Company's surplus by such amount which would have resulted in ICT Insurance having surplus as of that date in an amount less by $586,091.82, and in order that such surplus notes could be used in connection with the payment of balances due on the fictitious reinsurance treaties as hereinbefore alleged.

167.

That in order to retire such surplus notes, a scheme and plan was devised in December 1953 whereby three of such surplus notes in the amount of $203,485.77 would be retired and/or allegedly paid by ICT Insurance in such a manner as not to decrease the assets of ICT Insurance. This scheme and plan was entered into and carried out by Ben Jack Cage, JACCO of Texas, Francis J. Knoll, La Comercial, Commercial and General, Leadenhall Corporation, as agent for Commercial and General Fire and Marine, and Combined Investments, Inc., a Ben Jack Cage-controlled corporation, in the following manner:

168.

On December 30, 1953, ICT Insurance issued its check to [fol. 173] La Comercial in the amount of $217,048.10, which represented the payment of principal on three of such surplus notes plus 5 per cent prepayment penalty in the amount

of $10,174.29, plus $3,388.04 interest; such check was deposited in La Comercial's account in the Republic Bank, Dallas, Texas, on December 31, 1953. On the same date, La Comercial's check in the amount of $217,048.10 was issued to Leadenhall Corporation, a Delaware Corporation, controlled by Ben Jack Cage and deposited in Leadenhall's bank account in the Republic Bank on the same date. On the same date, Leadenhall Corporation issued its check in the amount of $200,000.00 to Combined Investments, Inc., a Ben Jack Cage-controlled company, which $200,000.00 was deposited in Combined Investments, Inc., account in Dallas. On the same date, December 31, 1953, Combined Investments, Inc., supposedly loaned such $200,000.00 to JACCO of Texas and issued its check to Jack Cage and Company of Texas of $200,000.00 on the same date, December 31, 1953. On the same date, December 31, 1953, Jack Cage and Company of Texas paid this $200,000.00 to ICT Insurance for the purchase of no par stock of ICT Insurance. Although such check transactions went through La Comercial, a Cuban company; Commercial and General, an African company; Leadenhall Corporation, a Delaware corporation; Combined Investments, Inc., a Texas corporation; JACCO of Texas, a Texas corporation; and ICT Insurance, a Texas corporation; all of such checks were issued in Dallas, Texas, on the same dates and deposited in the respective bank accounts of such companies on the same dates.

169.

That such transaction was entered into for the purpose of and had the effect of allegedly retiring such surplus notes, and at the same time keeping such money in ICT Insurance for statement purposes, at the same time enabling Ben Jack Cage to use such money for his own use and benefit in acquiring stock of ICT Insurance for the purpose of fulfilling subscriptions which had already been [fol. 174] paid into Jack Cage and Company of Texas, and which funds had already been misused by Ben Jack Cage and the officers and directors of Jack Cage and Company of Texas, and further, had the effect of decreasing any equity that the other stockholders of ICT Insurance had through the issuance of such additional stock of ICT

Insurance; but at the time that such check of ICT Insurance in the amount of $217,048.10 was issued, Ben Jack Cage and Francis J. Knoll knew that such surplus notes had in effect been retired when such surplus notes were returned to ICT Insurance by Narragansett and La Comercial in August 1952 in connection with the payment of the balances due ICT Insurance from these companies. Therefore, when such check of ICT Insurance was issued, and when the proceeds of such check were used by Ben Jack Cage and JACCO of Texas in the manner hereinbefore alleged, all of such acts constituted a conversion, misappropriation, theft, and swindle of ICT Insurance Company's assets in the amount of $217,048.10.

170.

In June 1954, the balance of such surplus notes plus interest was allegedly retired and/or paid off by ICT Insurance in substantially the same manner as hereinbefore alleged. On June 4, 1954, ICT Insurance issued its check payable to La Comercial in the amount of $416,084.07, which represented the payment of principal in the amount of $382,606.05, and interest of $33,478.02. This money was deposited by La Comercial in its account in the Mercantile Bank on June 7, 1954, and on the same date, a check in the same amount was issued by La Comercial payable to Francis J. Knoll, Trustee of Commercial and General. On the same date, three checks were issued on the Francis J. Knoll Trustee Account in the Mercantile Bank to the following entities in the following amounts: $100,000.00 to Triangle Research and Advertising, being a Nevada corporation owned and controlled by Francis J. Knoll; $100,000.00 to Oxford Corporation, a Nevada corporation, [fol. 175] owned and controlled by Ben Jack Cage and an agent for Commercial and General; and $200,000.00 to JACCO of Delaware, a Ben Jack Cage-controlled company. On June 7, 1954, the same date, these companies, Triangle Research and Advertising, Oxford Corporation and JACCO of Delaware, disbursed the same amounts that had just been received by them to JACCO of Texas as a loan to JACCO of Texas. On or about June 7, 1954, the same date,

Jack Cage and Company paid this $400,000.00 over to ICT Insurance for stock of ICT Insurance.

171.

That such transaction was entered into for the purpose of and had the effect of allegedly retiring such surplus notes and at the same time keeping such money in ICT Insurance for statement purposes and at the same time enabling Ben Jack Cage to use such money for his own use and benefit in acquiring stock of ICT Insurance for the purpose of fulfilling subscriptions which had already been paid into Jack Cage and Company of Texas and which funds had already been misused by Ben Jack Cage and the officers and directors of Jack Cage and Company of Texas and further had the effect of decreasing any equity that the other stockholders of ICT Insurance had through the issuance of such additional stock of ICT Insurance. At the time that such check of ICT Insurance in the amount of $416,084.07 was issued, Ben Jack Cage and Francis J. Knoll knew that such surplus notes had in effect been retired when such surplus notes were returned to ICT Insurance by Narragansett and La Comercial in August 1952 in connection with the payment of the balances due ICT Insurance from these companies. Therefore, when such check of ICT Insurance was issued and when the proceeds of such check were used by Ben Jack Cage and JACCO of Texas in the manner hereinbefore alleged, all of such acts constituted a conversion, misappropriation, theft, and swindle of ICT Insurance Company's assets in the amount of $416,084.07.

[fol. 176] 172.

That the dishonest and fraudulent acts of Francis J. Knoll and Ben Jack Cage as hereinbefore alleged in connection with the retirement of such surplus notes was a breach of their fiduciary duty to ICT Insurance; that through the acts of all these corporations, La Comercial, Commercial and General, Combined Investments, Inc., Francis J. Knoll, trustee, Triangle Research and Advertising, JACCO of Delaware, and JACCO of Texas, they

joined, aided, and abetted such officers and/or directors in the breach of their fiduciary duties to ICT Insurance; all of such acts were in furtherance of and aided and abetted the conspiracy; that furthermore, these dishonest and fraudulent acts of these defendants constituted a conversion, misappropriation, swindle, and theft of ICT Insurance Company's assets in the total amount of $633,132.17; for which amount the Receiver herein sues such defendants to recover.

173.

In August 1953, the Charter of ICT Insurance was caused to be amended by the Directors of ICT Insurance. At this time, as hereinbefore alleged, the capital structure of ICT Insurance was 140,000 shares of par value stock, with an alleged par value of $10.00 per share. On August 17, 1953, the Charter of ICT Insurance was amended, authorizing 560,000 shares of no par value stock. It was represented that one-half of the no par value of stock in the amount of 280,000 shares had been in good faith subscribed and paid for; the corporation having been paid in full for the 140,000 shares of par value stock then outstanding as represented by the original Charter and amendments thereto. The outstanding stockholders of ICT Insurance were then given two shares of such no par value stock in substitution for each share of the par value stock that they held. The balance of the 280,000 which was authorized but not issued was then planned to be used and was used to fulfill the installment contracts of purchasers who had contracted to purchase stock of ICT Insurance on [fol. 177] an installment basis. Further, such shares of no par stock were sold to unions and union members and to the public for $15.00 per share as stated by the Board of Directors' Resolution authorizing such amount.

174.

In November 1953, ICT Insurance owned installment contracts of purchasers of ICT Insurance stock on an installment basis. These installment contracts were not admissible assets in ICT Insurance for statement purposes. In November 1953, a scheme was devised, engineered, and

carried out in furtherance of the conspiracy whereby $500,000.00 of such installment contracts would be converted to cash in order that ICT Insurance could show in its annual statement as of December 31, 1953, that it had admitted assets in such amount. This scheme and plan was carried out in the following manner:

175.

On November 13, 1953, Ben Jack Cage made a loan application with Oscar C. Bruce, Senior Vice-President of the Republic Bank to borrow $500,000.00 in the name of JACCO of Texas, such loan to be repaid in two installments: $250,000.00 to be repaid on January 25, 1954, and $250,000.00 to be repaid on February 25, 1954. It was represented that JACCO of Texas would use the proceeds from such loan exclusively for the purchase of 41,666 shares of ICT Insurance stock at a value of $12.00 per share and that such stock would be pledged to the bank as collateral and was being offered to the residents of Texas at $15.00 per share. As security for such loan, it was agreed that 41,666 shares of ICT Insurance stock would be pledged as collateral as well as $600,000.00 worth of such installment contracts of ICT Insurance.

176.

On December 5, 1953, Jack Cage and Company of Texas by John G. Vaughan and Ben Jack Cage, collaterally endorsed by Ben Jack Cage, executed their note to the Republic Bank in the amount of $500,000.00. Such note was [fol. 178] payable $250,000.00 on January 25, 1954, and $250,000.00 on February 25, 1954. As collateral for such loan, there were pledged to the Republic Bank 41,666 shares of ICT Insurance stock, ICT Insurance stock subscriptions in the amount of 600,000, and a life insurance policy on the life of Ben Jack Cage in the amount of $500,000.00. On December 5, 1953, the $500,000.00 was deposited in JACCO of Texas' account in the Republic Bank, and on the same date, JACCO of Texas issued its check to ICT Insurance in the amount of $500,000.00, which $500,000.00 check was deposited to the account of ICT Insurance in the Republic Bank. On January 31, 1954, JACCO of

Texas used monies received from unions, union members, and the public received on the installment contracts of ICT Insurance to pay $250,000.00 on such note, and on February 28, 1954, used monies received from unions, union members and the public on such installment contracts of ICT Insurance to pay off the balance of the principal of such amount in the amount of $250,000.00, together with interest in the total amount of $4,402.75.

177.

On December 31, 1953, the Republic Bank charged ICT Insurance Company's account in the amount of $525,000.00, for the purchase of U.S. Treasury Bills. These Treasury Bills never came into the possession of ICT Insurance but remained in the possession of the Republic Bank, and on January 2, 1954, ICT Insurance Company's account in the Republic Bank was credited by the Republic Bank in such amount of $525,000.00 for the alleged repurchase of such U.S. Treasury Bills by the Republic Bank. Balance in ICT Insurance Company's account and/or such U.S. Treasury Bills remained with the Republic Bank in excess of $500,000.00 throughout the duration of such loan.

178.

At the time that such transaction was entered into between Ben Jack Cage, John G. Vaughan, Francis J. Knoll, [fol. 179] Frank G. Newman, and the Republic Bank, these defendants knew and were charged with knowledge that the whole purpose of such transaction was to change nonadmissible assets of ICT Insurance in the form of installment contracts to admissible assets in the form of cash or U.S. Treasury Bills in the amount of $500,000.00 as an admissible asset through the subterfuge of such loan transaction in order that it could be falsely represented in ICT Insurance Company's annual statement as of December 31, 1953, that ICT Insurance had such additional assets in the amount of $500,000.00, free and unencumbered. The Republic Bank knew and was charged with knowledge that JACCO of Texas was an agent of ICT Insurance and that under the terms of the management contract of JACCO of Texas and under such relationship of principal and

agent, JACCO of Texas had no authority to allegedly purchase such stock of ICT Insurance and then turn around and use such stock and assets of ICT Insurance in the form of installment contracts as security for such individual loan. In the alternative, the Bank knew by reason of such agency relationship that such loan was in effect a loan to ICT Insurance and that such transaction was entered into in such manner so that it could be falsely represented that ICT Insurance did not have a liability for borrowed money in its books and annual statement in the amount of $500,000.00 and so it could be falsely represented that ICT Insurance had additional assets in such amount of $500,000.00 over and above its liabilities; that by reason of such fraudulent and dishonest acts, Ben Jack Cage, John G. Vaughan, and Francis J. Knoll breached their fiduciary duties to ICT Insurance; that by the participation and aiding in such transaction, the Republic Bank and Frank G. Newman joined, aided, and abetted such officers and directors of ICT Insurance in such breach of their duty; all of such acts by these defendants furthered the conspiracy by joining and aiding in the making of and making possible the filing of a false financial statement of ICT Insurance as of December 31, 1953, showing ICT Insurance with $500,000.00 more admissible assets than it actually had in order to keep ICT Insurance [fol. 180] operating in violation of law.

179.

That in the alternative, the defendant Republic Bank by joining in, and aiding in the making of the representations in ICT Insurance Company's December 31, 1953 annual statement that such $500,000.00 was a free and unencumbered asset of ICT Insurance and was not the proceeds from borrowed money, the bank was estopped from contending otherwise, and when the assets of ICT Insurance being the collections from stockholders on the installment notes were used to repay such loan, such act constituted a conversion and misappropriation of assets of ICT Insurance in the amount of $500,000.00; for which amount the Receiver herein sues to recover from the Republic Bank.

180.

To further the conspiracy, on December 31, 1953, Ben Jack Cage, Francis J. Knoll, and Frank G. Newman entered into another fraudulent loan transaction with the Republic Bank in order to further the painting of a false financial picture of a liquid and solvent condition in ICT Insurance Company's annual statement as of December 31, 1953. This scheme was entered into and carried out in the following manner: In order to again convert installment premium notes into liquid assets in the form of U.S. Treasury Bills, Ben Jack Cage, Francis J. Knoll, and Frank G. Newman entered into a transaction with the Republic Bank, through its Vice-President, Oscar C. Bruce, to obtain a loan in the name of ICT Insurance in the amount of $400,000.00, but in connection with such transaction to draw certain instruments and papers in order to make it appear in ICT Insurance Company's books and records and in the annual statement that ICT Insurance sold or discounted $400,000.00 worth of premium notes to the Republic Bank for a period of two days. On December 31, 1953, an agreement was entered into by and between Ben Jack Cage as President of ICT Insurance and the Republic Bank whereby ICT Insurance would sign a note to the [fol. 181] Republic Bank for $400,000.00 at four per cent interest for two days. There was an additional or side agreement that the Republic Bank would allegedly purchase $400,000.00 worth of premium notes from ICT Insurance on December 31, 1953, with the agreement that the proceeds from the sale of the notes paid to ICT Insurance by Republic Bank would be used on the same date, December 31, 1953, to purchase a like amount of Treasury Bills, which Treasury Bills would be sold on January 2, 1954, and the proceeds from sale of such Treasury Bills would be used by ICT Insurance to repurchase the premium notes from the Republic Bank.

181.

On December 31, 1953, a Promissory Note of ICT Insurance was executed to the Republic Bank in the amount of $400,000.00, bearing interest at the rate of four per

cent, such Promissory Note being due January 2, 1954. On the same date, the proceeds from the note was deposited directly to the account of ICT Insurance and a duplicate deposit slip was given to ICT Insurance showing that such $400,000.00 deposited was the proceeds from such loan. On the same date, the Republic Bank purchased $400,000.00 worth of U.S. Treasury Bills allegedly on behalf of ICT Insurance by debiting ICT Insurance Company's account. On the same date of December 31, 1953, in an attempt to cover up the fact that the $400,000.00 received by ICT Insurance from the Republic Bank was a loan or borrowed money, an instrument was executed as between ICT Insurance and the Republic Bank and signed by Ben Jack Cage as President and Francis J. Knoll as Secretary, wherein it was purportedly agreed that as of such date, ICT Insurance had sold to or discounted to the Republic Bank $400,000.00 worth of premium notes owned by ICT Insurance. On the same date, December 31, 1953, a sealed or bound box containing premium notes of ICT Insurance were delivered to the Republic Bank, together with an affidavit executed by Francis J. Knoll as of December 31, 1953, certifying that as of such date, a box con-
[fol. 182] taining premium notes in the unpaid principal amount of $584,000.00 was delivered to the Republic Bank.

182.

The U.S. Treasury Bills in the amount of $400,000.00 were never delivered over to ICT Insurance, but were held by the Republic Bank as security for such loan, and on January 2, 1954, in conformity with the agreement with the Republic Bank, the Republic Bank sold the $400,000.00 of U.S. Treasury Bills, credited the $400,000.00 on the same date to ICT Insurance Company's account, and then on the same date, withdrew from ICT Insurance Company's account by debiting such account the amount of $400,088.88 and paid such amount over to itself in payment of ICT Insurance Company's note plus interest, which note was due on such date of January 2, 1954, as hereinabove alleged. The sealed and bound container containing the premium notes in the amount of $584,000.00 as represented in Knoll's affidavit was returned unopened to

ICT Insurance. In ICT Insurance Company's annual statement as of December 31, 1953, ICT Insurance carried as a free and unencumbered asset the $400,000.00 worth of U.S. Treasury Bills, $156,465.61 of premium notes, and it was represented that ICT Insurance, as of December 31, 1953, owed no amount for borrowed money.

183.

At the time that such transaction was entered into and carried out, the Republic Bank knew and was charged with knowledge that as of December 31, 1953, ICT Insurance was required to file its sworn annual statement, showing its true financial condition in order to enable it to continue to do business for the forthcoming year. The Republic Bank knew that such transaction was a year-end window dressing scheme for statement purposes of ICT Insurance. The Bank knew that such loan transaction was entered into to aid in showing a better liquid and financial position in ICT Insurance Company's December 31, 1953, [fol. 183] annual statement. The Bank knew and was charged with knowledge that the purpose of such loan was to enable ICT Insurance in its annual statement to substitute U.S. Treasury Bills in the amount of $400,000.00 for installment premium notes. The Bank knew and was charged with knowledge that the U.S. Treasury Bills in the amount of $400,000.00 was purchased with the proceeds of the loan to ICT Insurance and that such U.S. Treasury Bills were held as collateral by the Bank for the repayment of such loan and/or that the U.S. Treasury Bills in the amount of $400,000.00 was to be sold by ICT Insurance on January 2, 1954, in order to repay such loan. The Republic Bank therefore knew that such U.S. Treasury Bills in the amount of $400,000.00 carried in ICT Insurance Company's annual statement was encumbered and earmarked for the repayment of ICT Insurance Company's loan to the Republic Bank and that ICT Insurance did not have the free and unrestricted use of such U.S. Treasury Bills with which to pay the claims of its policyholders and debts due to its creditors. The Bank knew and was charged with knowledge that the agreement entered into on December 31, 1953, under which ICT In-

surance allegedly sold on such date $400,000.00 of its premium notes to the Republic Bank was a subterfuge in order to cover up the fact that ICT Insurance had executed its note to the Republic Bank on December 31, 1953, in the amount of $400,000.00 to aid in further falsifying ICT Insurance Company's annual statement in showing that as of December 31, 1953, ICT Insurance owed no amount for borrowed money. Through such acts, the Republic Bank further aided and abetted the conspiracy by aiding these defendants in falsifying ICT Insurance Company's annual statement as of December 31, 1953, in falsely showing ICT Insurance had $400,000.00 worth of U.S. Treasury Bills, free and unencumbered, and in showing that ICT Insurance owed no borrowed money as of December 31, 1953. The defendants Ben Jack Cage, Francis J. Knoll, and Frank G. Newman devised and carried out the scheme with the aid of the Republic Bank in order to falsify ICT Insurance Company's December 31, 1953, annual state-
[fol. 184] ment. These defendants knew that the $400,000.00 worth of U.S. Treasury Bills which were carried in ICT Insurance Company's annual statement as a free and unencumbered asset were the proceeds from a loan at the Republic Bank and that such U.S. Treasury Bills were encumbered and earmarked for the purpose of repaying such loan. These defendants knew that contrary to the statement in ICT Insurance Company's annual statement that ICT Insurance owed no amount for borrowed money, that in truth and in fact, as of December 31, 1953, ICT Insurance had an outstanding loan at the Republic Bank as hereinbefore alleged, in the amount of $400,000.00. Furthermore, these defendants knew, and/or were charged with knowledge that when ICT Insurance carried in its annual statement as of December 31, 1953, premium notes in the amount of $156,465.61 as a free and unencumbered asset, that such premium notes were on pledge at the Republic Bank to secure ICT Insurance Company's $400,000.00 note and were therefore encumbered. These defendants devised this scheme and carried it out with the aid of the Republic Bank as a year-end window dressing proposition in order to falsify ICT Insurance Company's annual statement and through such fraudulent acts, induce

the Board to renew ICT Insurance Company's certificate, and thereby permit ICT Insurance to continue to do business for the coming year. By such acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duties to ICT Insurance. Through such fraudulent acts of the Republic Bank and Frank G. Newman, such defendants joined, aided, and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance, and the false, fraudulent, wrongful, and illegal acts of all of these defendants furthered, aided, and abetted the conspiracy.

184.

In the alternative, by such false and fraudulent acts, the Republic Bank joined and aided in representing that as of December 31, 1953, ICT Insurance owned U.S. Treasury Bills free and unencumbered in the amount of $400,000.00 and owed no money to the Republic Bank, and therefore, the bank was estopped from contending otherwise, and when $400,000.00 of ICT Insurance was accepted [fol. 185] by the Republic Bank on January 2, 1954, for the repayment of such note to the Republic Bank, such act constituted a conversion and misappropriation by the Republic Bank of $400,000.00 of assets of ICT Insurance; for which amount the Receiver herein sues the Republic Bank to recover on behalf of ICT Insurance and its claimants, creditors, policyholders, and stockholders.

185.

After having entered into such transactions, the annual statement of ICT Insurance as of December 31, 1953, was prepared under the direction and supervision of the Officers and Directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by John G. Vaughan as Vice-President, Francis J. Knoll as Secretary, and Francis J. Knoll as Treasurer and was filed with the Board in Austin, Travis County, Texas. The annual statement contained at least the following false statements:

(a) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 9,240 shares of the capital stock of ICT Life at the value of $247,457.92, when in truth and in fact, such stock was not an admissible asset and was not worth such value.

(b) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance had 10,000 shares of the common Class A stock of ICT Discount Corporation at the value of $30,000.00 and 6,300 shares of the Common Class B stock of ICT Discount at the value of $37,800.00, when in truth and in fact, such stock was not an admissible asset and was not worth such value.

(c) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 10 shares of the common stock of United Metropolitan Corporation at the value of $1,000.00, when in truth and in fact, such stock was not an admissible asset.

(d) On page 20, schedule D, part 1, "Bonds Owned as [fol. 186] of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned first mortgage bonds of Dunne Press at the value of $4,928.74, when in truth and in fact, such bonds were not an admissible asset and were worthless.

(e) On page 19, schedule C, part 1, "Collateral Loans as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance held a collateral loan in the form of a note secured by a deed of trust executed by Alamo Motor Lines at the value of $146,308.51, when in truth and in fact as hereinbefore alleged, such mortgage loan was not an admissible asset.

(f) On page 20, schedule D, part 1, "Bonds Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned free and clear of any encumbrance U.S. Treasury Bills at the value of $900,000.00, when in truth and in fact, as hereinbefore alleged, such U.S. Treasury bills carried in such schedule in such

amount were pledged with the Republic Bank as security for the balance owing under the $500,000.00 loan to Ben Jack Cage and/or ICT Insurance and the $400,000.00 loan to ICT Insurance.

(g) On page 3, under "Liabilities, Surplus and Other Funds as of December 31 of Current Year," it was stated that as of December 31, 1953, ICT Insurance did not owe any amount for borrowed money, when in truth and in fact, the $500,000.00 loan entered into between the Republic Bank and JACCO of Texas and/or Ben Jack Cage in December 1953 was in effect a loan to ICT Insurance.

(h) On page 3, under "Liabilities, Surplus and Other Funds as of December 31 of Current Year," it was stated that as of December 31, 1953, ICT Insurance did not owe any amount for borrowed money when in truth and in fact, as hereinbefore shown on December 31, 1953 ICT Insurance was caused to execute its note to the Republic Bank in the amount of $400,000., which note was outstanding and unpaid as of December 31, 1953.

[fol. 187] (i) On page 11, Exhibit 1, "Analysis of Assets as of December 31 of Current Year," and on page 2, under "Assets" it was stated that ICT Insurance had free and unencumbered a net admitted asset in the form of premium installment notes (bills receivable taken for premiums) in the amount of $156,465.61, when in truth and in fact, such premium installment notes as hereinbefore alleged, were pledged with the Republic Bank as security on the December 31, 1953 $400,000. loan to ICT Insurance.

(j) On page 3, under "Liabilities, Surplus and Other Funds as of December 31 of Current Year," it was stated that as of December 31, 1953, the total liabilities of ICT Insurance were $4,629,787.13, when in truth and in fact, such liabilities were greater in the amount of $382,606.05 by reason of the fact that ICT Insurance surplus notes in the amount of $382,606.05 which were issued in connection with the purchase of the Continental Fire stock as hereinbefore alleged were still outstanding and were not listed as a liability.

(k) On page 17, under Schedule A, Part 1, "Real Estate Owned as of December 31 of Current Year," and on page 2, it was stated that the ICT Building had a market value less encumbrance as an asset in the amount of $407,278.33, when in truth and in fact, such value was inflated in the amount of $152,500, as hereinbefore alleged by virtue of the fact that ICT Insurance had issued its surplus note and paid a consideration of $152,500, more than such building was actually worth.

(l) On page 3, under "Liabilities, Surplus and Other Funds as of December 31 of Current Year," it was stated that as of December 31, 1953, the total liabilities of ICT Insurance were $4,629,787.13, when in truth and in fact, such liabilities were greater in the amount of $152,500, by reason of the fact that ICT Insurance surplus notes which were issued in connection with the purchase of the ICT Building in the amount of $152,500, were still outstanding and were not listed as a liability.

[fol. 188] (m) On page 25, under Schedule F, Part 1A, "Ceded Reinsurance as of December 31 Current Year," it was stated that ICT Insurance had ceded to Continental Union Insurance Company loss reserves in the amount of $900,619.17 and unearned premium reserve in the amount of $2,762,761.32, and on page 3, "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a surplus as respects policyholders of $3,160,583.66, when in truth and in fact, such statements were false by reason of the fact as hereinbefore alleged, the Reinsurance Treaty as between ICT Insurance and Continental Union was a subterfuge and was worthless and therefore ICT Insurance Company's surplus was less in the amount of $1,243,242.59.

(n) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a surplus as regards policyholders in the amount of $3,160,583.66, when in truth and in fact, ICT Insurance did not have this amount of surplus. As hereinbefore shown, since the Treaties as between ICT Insurance and Continental Union were a subterfuge and by reversing the entries as between Continental Union and ICT Insurance, the net result would be a receivable from Continental Union to ICT Insurance in the

amount of $4,433,314.99; that since such amount was not collectible from Continental Union, such receivable in such amount would be non-admitted or deducted from the surplus of ICT Insurance and would thereby reduce the surplus represented in such Annual Statement in such amount of $4,433,314.99.

(o) On page 25, under Schedule F, Part 1A, "Ceded Reinsurance as of December 31, Current Year," it was stated that ICT Insurance had ceded to Guardian Insurance Company loss reserves of $600,412.78 and unearned premium reserves of $1,841,840.88 and on Page 3 under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had surplus as regards policyholders of $3,160,583.66 when in truth and in fact, such statements were false by reason of the fact as hereinbefore alleged, such treaty with [fol. 189] Guardian was a subterfuge and such fictitious treaty was entered into for statement purposes only and therefore ICT Insurance had no reinsurance with Guardian. Therefore, ICT Insurance Company's surplus was falsely represented to be by virtue of this transaction $828,828.40 more than it actually was.

(p) On page 25, under Schedule F, Part 1A, "Ceded Reinsurance as of December 31 Current Year," it was stated that ICT Insurance had ceded to Lloyds of London unearned premium reserve in the total amount of $366,941.02 and on Page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a surplus as regards policyholders of $3,160,583.66, when in truth and in fact, by reason of the fact that ICT Insurance could not take credit under the law for such unearned premium reserve ICT Insurance Company's surplus was less than what was actually stated in the amount of $366,941.02.

(q) On page 4, under "Underwriting and Investment Exhibit Statement of Income as of December 31 of Current Year," it was stated that ICT Insurance had only a total underwriting loss of $464,554.55, when in truth and in fact, ICT Insurance had an underwriting loss in an additional amount of $430,306.80 more or a total underwriting loss of $894,861.35 by reason of the fact that the amount of $430,306.80 through fictitious and false bookkeeping entries and

manipulations was deducted from underwriting expenses incurred and listed as a stock sales expense under the "Capital and Surplus Account," on page 4, thereby giving a false picture of the underwriting operation of ICT Insurance during the year 1953.

(r) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that as of December 31, 1953, ICT Insurance had a capital of $1,500,000. and unassigned funds or surplus in the amount of $1,660,583.66 or a surplus as regards policyholders in the amount $3,160,583.66, when in truth and in fact, ICT Insurance had no capital and had no surplus and was insolvent.

186.

During the year 1953, and at the time the December 31, 1953 Annual Statement of ICT Insurance was prepared, and at the time said Statement was submitted to the Board [fol. 190] of Insurance Commissioners, the following defendants were Officers and/or Directors and/or Trustees of ICT Insurance: Nile E. Ball, Ben Jack Cage, John G. Vaughan, Francis J. Knoll, Freeman Everett, William J. Harris, Marcus Loftis, Kenneth Mabry, M. M. McKnight, J. A. Mahon, Jr., Paul C. Sparks, J. H. Abright, Doris Baker, William A. Cullen, W. S. East, Eddie Gross, Charles Jones, P. C. Klein, Fred Lucas, W. C. McMasters, W. L. Pickens, C. R. Saunders, L. A. Townsend, J. M. West, Walter Wideman, Frank Yeager, Vernon Evans, Ray Johnson, Walton N. Newman, Frank Owens, Claude Ritchie, Bill Sams, George Webber, Ed Weimar, T. W. Wheeler, Steve Booke, C. O. Blackburn, Stanley E. Prichard, W. A. Combs, L. "Bud" Laird, Robert F. Fly. At the time that these false, fraudulent and fictitious financial transactions were entered into and at the time that the false statements were made in the Annual Statement, and at the time that such Annual Statement was submitted to the Board of Insurance Commissioners, each of these defendants either participated in such fraudulent transactions and/or knew and/or were charged with knowledge of the fraudulent aspects of such financial transactions and that some or all of such statements were false, or as Officers and/or Directors, they neg-

ligently and carelessly permitted such fraudulent transactions to be entered into and such false statements to be made and submitted to the Board, when with ordinary care in exercising their duties as Officers or Directors, they could have, and should have known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made, with the intent that the same should be submitted to the Board of Insurance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a Certificate, certifying that ICT Insurance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1954. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a Certificate of such Compliance would be circulated [fol. 191] as required by law, and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders and stock subscribers that ICT Insurance had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and these classes of persons, and was a breach of such Officers' and Directors' fiduciary duty to ICT Insurance, and were a part of and in furtherance of and in aid of the conspiracy; that by the hereinbefore alleged acts of the persons and entities, hereinabove named, other than such Officers and Directors, in entering into, aiding, participating and joining in the fraudulent acts hereinbefore alleged which were entered into to fictitiously increase ICT Insurance Company's assets and fictitiously lower its liabilities, such persons joined in, aided and abetted the Officers and Directors in the making of such false and fraudulent December 31, 1953 Annual Statement of ICT Insurance, and thereby aided and abetted such Officers and Directors in the breach of their fiduciary duty to ICT Insurance; all of which acts were a part of and in furtherance of and in aid of the conspiracy. The false statements in ICT Insurance Company's Annual Statement and submitted by its Officers to the Board were state-

ments made directly to the Board, were statements made as to material facts and was, and were, relied upon by said Board as the truth, and did cause the Board to issue a Renewal Certificate of Authority for ICT Insurance to continue to do business in 1954, together with a Certificate of Publication which was published in two newspapers of wide circulation as required by law.

187.

To further the conspiracy, some time during the year 1954, after the Annual Statement was prepared and filed, and at an exact date well-known to the defendants, a financial statements of ICT Insurance in pamphlet form was [fol. 192] again prepared and widely distributed to the existing and prospective claimants, creditors, insurance agents, stockholders and policyholders of ICT Insurance. On the front of such pamphlet was the statement "1953—Financial Statement—The Insurance Company of Texas, Dallas, Texas—Owned by Union Members Building a Better America—Jack Cage & Company, Managers." On one portion of the pamphlet was a financial statement showing ICT Insurance Company's assets and liabilities as of December 31, 1953 to be the same as shown on pages 2 and 3 of ICT Insurance Company's December 31, 1953 Annual Statement and showing a capital of $1,500,000., unassigned surplus, $1,660,583.66 and surplus as regards policyholders $3,160,583.66. Certain of the assets and liabilities used to make up such pamphlet statement to show such capital and surplus were false for the same reason as hereinbefore shown that they were false in the December 31, 1953 Annual Statement of ICT Insurance. On one side of the financial pamphlet was a President's report signed by Ben Jack Cage, which stated as follows:

"The Insurance Company of Texas took long strides during 1953. It was a year of consolidating gains, expanding facilities and increasing business.

As is necessary in the development of a strong, sturdy financial institution, we believe we have provided a solid and safe foundation for your company. No greater proof of its soundness may be found than

in your company's substantial investments in government bonds and its stabilizing underwriting practices which have brought ICT an even higher quality of business.

In 1953, ICT broadened its facilities to include complete Accident and Health and Bond Departments. Both are traditionally profitable lines. The strengthening of other departments last year and the further extension of facilities and services during the coming year forecast many healthy prospects for continued sound growth.

Your company has enlarged its field of operations. At the end of 1953, ICT was licensed to operate in 24 states and Alaska, and expects to obtain licenses in several additional states early in 1954. The opening of 15 new service and branch offices in 10 states has further strengthened the position of your company.

A tangible demonstration of ICT growth was the purchase of the 21-story Irwin-Keasler Building by the ICT Group in November. The downtown Dallas skyscraper, valued at $2 Million, has been renamed the ICT Building and will be occupied in the near future as a Home Office by the ICT Group.

Last fall, classroom teachers and school administra- [fol. 193] tors from all over Texas asked ICT officials for an opportunity to participate in the ICT program. Out of this request grew the Educators Division of the ICT Group—a division which has admitted teachers and school and college administrators as ICT Group partners. This new division is now designing an insurance program specifically for Texas educators.

Much credit for the healthy growth of the Insurance Company of Texas must go to the 425 employees, a 37 per cent increase in personnel over the previous year. These men and women take great pride in serving ICT's owner-customers and agents and in helping to build the company's strength and stability. Among the many new employees are key officers and department heads—competent and experienced executives who are highly qualified to serve ICT.

I want to add my personal thanks to ICT's growing force of local agents who have been the backbone of ICT's business growth. ICT is proud to support the traditional American agency system and is grateful for the confidence our agents have placed in our company.

In the final accounting of our growth, the faith of ICT stockholders in their company must be added to the loyalty of employees and the confidence of ICT agents. The thousands of working people who are our partners have proved that people can and will do business with themselves. And that basically is the key of our growth—past and future.

The future of ICT lies largely in the continued expansion of the owner-customer idea. The program unanimously adopted by your directors and stockholders of plowing back all profits to strengthen the company, thus foregoing any dividends for the next several years, is tangible evidence to me that ICT is to be built strong and solid, and is to have a healthy growth over a long period of time. For our partners have been our customers, or stockholders. So long as the ICT team—stockholders, agents and employees—uphold their share in ICT's formula for success, we will make our own future—a future unlimited."

There was also listed on such statement the names of the Officers and/or Directors of ICT Insurance Company.

188.

To further the conspiracy, financial pamphlets were obtained from "Dunne's Insurance Report." These pamphlets were obtained from such reporting concern by furnishing such concern the December 31, 1953 Annual Statement of ICT Insurance and based upon such Annual Statement the Dunne's Insurance Report prepared a pamphlet statement and the Dunne's Insurance Report, a so-called insurance rating concern in such pamphlet statement rated ICT: "Rated A+ (excellent) Dunne's Fire and Casualty Insur- [fol. 194] ance Report 1954." Such pamphlet obtained from Dunne's Insurance Report further stated that:

"FINANCE—In its financial statement as of December 31, 1953, the Company listed assets of $7,790,371, an increase for the year of 23.0%. These assets include the following: cash $942,482, U.S. Government bonds $2,401,783, other high-grade bonds $153,868, and select stocks $419,633. Remaining assets were distributed as follows: real estate $556,923, first mortgage loans $114,651, premiums in course of collection and not overdue $2,683,589, interest due and accrued $6,867, and all other assets $510,573.

LIQUIDITY—In the financial administration of an insurance company, liquidity or quick availability of capital funds to meet possible emergencies, is a prime consideration. This Company's cash, plus securities that may be converted immediately to cash, amounted to $6,601,355, which was equal to 142.6% of its liabilities. Its liquid position is excellent. This affords a measure of the Company's ability to cope with contingencies without undue sacrifice of investment values.

RESERVES—To provide for its operating expenses and other obligations during the current year, the Company has set aside reserve funds of $4,629,787 equal to 59.4% of its assets. These reserves were made up as follows: for claims in course of settlement, estimated losses and adjustment expenses, $1,151,107; for premiums collected in advance but not yet earned, $2,762,761; for taxes, $230,000, and for all other liabilities, $485,919.

SOLVENCY—After setting aside funds to cover all of its obligations, known or anticipated, this Company had $3,160,584, equal to 40.6% of its resources, as surplus for the additional protection of its policyholders. Surplus increased 26.1% during the year. In our opinion, the position of this Company with regard to surplus is very strong. Comparison of its cash and investments with its total obligations shows $168.27 of assets for every $100 of liabilities, a wide and favorable margin safety.

UNDERWRITING—A trading profit of 0.6% was revealed as a result of the following: Net premiums

written of $4,324,600 and underwriting expenses incurred of $1,726,746 producing an expense ratio of 39.9%; the loss ratio was 59.5% as a result of earned premiums in the amount of $3,114,864 and loss adjusting expenses incurred totaling $1,852,673. The net gain from investments amounted to $52,270.

OFFICERS—President, Ben Jack Cage; Vice Presidents, John G. Vaughan, J. H. Abright, C. O. Blackburn, Stanley E. Prichard, Paul Sparks; Vice President and Controller, James J. Brophy; Secretary and Treasurer, Francis J. Knoll.

RECOMMENDATION—Based on the foregoing analysis of its condition and affairs as of December 31, 1953, and appraisal of its management, we conclude that The Insurance Company of Texas, Dallas, Texas is worthy [fol. 195] of public confidence and so recommend it.

RATING—Under the heading of "Stock Companies," in Dunne's Fire and Casualty Insurance Report for 1954, the rating of this Company is A+ (Excellent)."

These statements in such Dunne's Insurance Report as to ICT Insurance total assets and liabilities and the other statements made as to ICT assets and liabilities and ICT financial condition were false for the same reason as hereinbefore alleged ICT Annual Statement as of December 31, 1953 was false. These pamphlets obtained from the Dunne's Insurance Report were likewise widely distributed to the existing and prospective creditors, claimants, stockholders, insurance agents and policyholders of ICT Insurance.

189.

At the time the financial pamphlet prepared on behalf of ICT Insurance was made, published and distributed, and at the time that ICT Insurance Company's Annual Statement was submitted to the Dunne's Insurance Report and the Dunne Insurance Report pamphlet was obtained and widely circulated and distributed as hereinbefore alleged, each of the defendants who were officers and directors as hereinbefore alleged knew that the statement was false or as

officers and/or directors they negligently and carelessly permitted such false statements to be made and published when with ordinary care in exercising their duties as officers and/or directors they could have and should have known the true facts. These defendants made and published, caused to be made and published, or negligently permitted to be made and published the statements with their name thereon with the purpose and intent that such statement be relied upon by existing and prospective innocent policyholders, creditors and stockholders to induce them to invest in ICT Insurance and to extend to ICT Insurance credit. Through such acts such officers and directors breached their fiduciary duty to ICT Insurance. Likewise, all of the defendants, as hereinbefore alleged, who participated in the false and fraudulent financial manipulations in aid of the creation of the false assets and concealment of liabilities, through [fol. 196] such acts as hereinabove alleged, aided such officers and directors in the breach of their fiduciary duty in connection with the publication and issuance of such false financial pamphlets. These false representations were made as to material facts and were relied upon by the classes of person to whom they were made. Such wrongful acts were wrongs as against ICT Insurance and its claimants, creditors, policyholders and stockholders by reason of the fact that pursuant to such wrongful acts, ICT Insurance was caused to continue to operate although insolvent and incur liabilities and obligations that it could not meet. Such wrongful acts by such defendants aided, abetted and furthered the conspiracy and became a part thereof.

190.

During the year 1954, ICT Insurance was caused to continue to sell and issue its insurance policies and thereby create additional liabilities over and above those that ICT Insurance had, and as hereinbefore shown could not pay by reason of its insolvent condition. Therefore, in order to show that ICT Insurance had sufficient assets to meet its liabilities and to show a solvent financial condition, during the year 1954 additional fraudulent and illegal transactions and manipulations were entered into, all of which were in furtherance of the conspiracy to keep ICT Insurance oper-

ating in violation of law although ICT Insurance was hopelessly insolvent.

191.

In January 1954, Ben Jack Cage; as President of ICT Insurance, entered into a transaction for ICT Insurance to purchase the A.R.A. Manufacturing Company, a sole proprietorship owned by O. P. Leonard. The A.R.A. Manufacturing Company was engaged in the business of manufacturing and selling car air-conditioners. The assets of such operation consisted primarily of machinery, equipment and inventory. Therefore, in effect, by ICT Insurance purchasing this proprietorship, it would be purchasing such equipment, machinery and inventory which could not have been carried as an admissible asset in ICT Insurance. [fol. 197] Therefore, to enable ICT Insurance to purchase such business and to make it possible for ICT Insurance to carry such interest purchased as an alleged admissible asset, a scheme was devised for ICT Insurance to purchase such sole proprietorship through a nominee, and to organize a corporation, and to have such nominee then transfer such sole proprietorship to the corporation in exchange for such corporation stock and then in turn for such nominee to assign such stock over to ICT Insurance.

192.

Such scheme was carried out in the following manner: On January 29, 1954, a letter agreement was entered into as between ICT Insurance, by Ben Jack Cage its President, and O. P. Leonard, wherein it was agreed that A.R.A. Manufacturing Company would be sold to ICT Insurance at a total purchase price of $815,463.81, payable $200,000.00 in cash and by ICT Insurance Company's execution of its promissory note in the amount of $615,463.81, such note to be secured by a chattel mortgage on all of the assets of A.R.A. Manufacturing Company. This consideration was paid as follows: On January 29, 1954, Ben Jack Cage caused ICT Insurance to issue its check in the amount of $100,000.00, payable to Rauscher, Pierce and Company, the proceeds of which were paid over to O. P. Leonard. On February 12, 1954 ICT Insurance was caused to issue

another $100,000.00 check to Rauscher, Pierce and Company the proceeds of which were paid over to O. P. Leonard, thus making such total of $200,000.00 cash paid by ICT Insurance to O. P. Leonard. On or about February 1, 1954, ICT Insurance was caused to execute its promissory note in the amount of $615,463.81 to Donald O'Neil, the person who had been chosen as the alleged nominee of ICT Insurance in this transaction for the balance of the purchase price agreed upon. On or about February 1, 1954, Donald O'Neil as the nominee and/or agent and/or representative of ICT Insurance executed a chattel mortgage to O. P. [fol. 198] Leonard in which chattel mortgage all of the property of A.R.A. Manufacturing Company was pledged as security for such promissory note executed by ICT Insurance to O. P. Leonard in the amount of $615,463.81. On or about the same date, on February 12, 1954, Donald O'Neil as nominee and/or agent of ICT Insurance conveyed all of the assets of the proprietorship that had been acquired from O. P. Leonard over to A.R.A. Manufacturing Company, a Delaware Corporation, that was organized in connection with such transaction, in exchange for 815,463 shares of $1.00 par common voting stock. Donald O'Neil then as nominee and/or agent of ICT Insurance transferred the 815,463 shares of A.R.A. Manufacturing Company of Delaware, to ICT Insurance.

193.

On or about August 23, 1954, Ben Jack Cage and Frank G. Newman caused to be incorporated under the laws of the State of Texas, a corporation known as the A.R.A. Manufacturing Company. The total authorized capital stock in the original Articles of Incorporation of A.R.A. Manufacturing Company of Texas was 260,000 shares of no par value stock divided into two classes: 180,000 shares of Preferred Stock and 80,000 shares of Common Voting Stock. All of the assets and all of the liabilities of A.R.A. Manufacturing Company of Delaware were assigned to the A.R.A. Manufacturing Company of Texas and the A.R.A. Manufacturing Company of Delaware was dissolved. ICT Insurance was caused to exchange its 815,463 shares of stock that it had held in the A.R.A. Manufacturing Company of

Delaware for the 80,000 shares of the common voting stock of A.R.A. Manufacturing Company of Texas.

194.

The 80,000 shares of A.R.A. Manufacturing Company's common voting stock was set up in ICT Insurance Company's books and was carried in ICT Insurance Company's Annual Statement as of December 31, 1954, at the value of [fol. 199] $200,000. The $615,463.81 promissory note executed by ICT Insurance, dated February 1, 1954, was not shown in ICT Insurance Company's books or in its December 31, 1954 Annual Statement as a liability. That in order to attempt to hide such $615,463.81 liability of ICT Insurance represented by such outstanding promissory note, an alleged agreement was entered into on or about the 17th day of August 1954 as between ICT Insurance by Ben Jack Cage, President, A.R.A. Manufacturing Company, by Frank G. Newman, executive Vice President and O. P. Leonard, whereby A.R.A. Manufacturing Company allegedly assumed such indebtedness owed by ICT Insurance represented by such promissory note and whereby ICT Insurance was allegedly released from such obligation and in connection therewith ICT Insurance was caused to execute its Performance Bond guaranteeing the payment by A.R.A. Manufacturing Company of such obligation to O. P. Leonard. This Performance Bond was executed by Frank G. Newman as executive Vice President of A.R.A. Manufacturing Company and by Ben Jack Cage as President of the Insurance Company of Texas; however, there was a side agreement as between O. P. Leonard, Ben Jack Cage and Frank G. Newman, wherein it was understood that the Assumption Contract was executed and the Performance Bond accepted with the understanding that it did not in any wise take away the primary responsibility of ICT Insurance for the obligation to O. P. Leonard on the $615,463.81 note executed by ICT Insurance to O. P. Leonard of February 1, 1954 for the balance of the purchase price of A.R.A. Manufacturing Company. The Receiver herein asks that such Performance Bond and agreements be set aside and held for naught as being frauds perpetuated against ICT

Insurance and its claimants, creditors, policyholders and stockholders.

195.

At the time that this scheme was entered into and carried out, Ben Jack Cage and Frank G. Newman knew and were charged with knowledge that if ICT Insurance purchased A.R.A. Manufacturing Company as a sole proprietorship, that such interest and such business could not have been carried as an admissible asset by ICT Insurance. In order to attempt to turn the interest in such business purchased into an admissible asset, these defendants carried out the scheme hereinbefore alleged of transferring such assets over to a newly organized corporation, known as the A.R.A. Manufacturing Company, in an attempt to substitute stock of such newly organized corporation for the non-admissible asset in the form of such sole proprietorship when even under such circumstances, these defendants knew that even the stock of such newly organized corporation could not be carried as an admissible asset since they knew and/or were charged with knowledge that under Article 2.10 of the Insurance Code, stock of a private corporation can be carried as an admissible asset only if the corporation had been in existence for a period of five years, had paid dividends for a period of five years and had not defaulted in any of its obligations. Furthermore, Ben Jack Cage and Frank G. Newman knew that ICT Insurance was liable on its outstanding note dated February 1, 1954, to O. P. Leonard in the amount of $615,463.81 and that the alleged assumption of such obligation by A.R.A. Manufacturing Company of such indebtedness in August 1954 was a subterfuge in order to attempt to hide such liabilities in the books and records and Annual Statement of ICT Insurance. By virtue of such fraudulent acts, Ben Jack Cage and Frank G. Newman as officers and/or directors of ICT Insurance breached their fiduciary duties to ICT Insurance and which fraudulent acts aided and abetted the conspiracy of keeping ITC Insurance operating in violation of law by creating assets and hiding liabilities in order to show a false picture of solvency of ICT Insurance.

[fol. 200]

196.

In connection with the purchase of A.R.A. Manufacturing Company, Ben Jack Cage illegally, wrongfully and fraudulently caused ICT Insurance Company on or about the 23rd day of February 1954 to unconditionally guarantee [fol. 201] the payment of the promises to pay Tecumseh Products Company all indebtedness and obligations for which A.R.A. Manufacturing Company then or thereafter may become liable or indebted to such company for supplies purchased by A.R.A. Manufacturing Company not to exceed more than $150,000., and the total interest and attorneys' fees which may be or become owing to such company by A.R.A. Manufacturing Company plus such sum of $150,000. On or about the 15th day of March 1954, Ben Jack Cage as President of ICT Insurance caused a similar guarantee agreement to be executed by ICT Insurance to Peerless of America not exceeding interest and attorneys' fees which might be owing by A.R.A. Manufacturing Company to such company plus the sum of $75,000. Such contingent liabilities were not recorded in the books of ICT Insurance and were not reflected in ICT Insurance Company's Annual Statement as of December 31, 1954. By reason of such transactions, Ben Jack Cage aided and furthered the conspiracy of hiding ICT Insurance liabilities in order to falsely show ICT Insurance in a solvent financial condition.

197.

To further the conspiracy, in June 1954, the following scheme was devised by Francis J. Knoll, Ben Jack Cage and Continental Union. On or about the 15th day of June, 1954, Ben Jack Cage and Francis J. Knoll caused Continental Union to purchase from E. L. Lockhart and Hildah W. Lockhart, his wife, a building and land in Dade County, Miami Beach, Florida. For such property, Continental Union paid to such persons the total consideration of $257,687.90. This consideration was paid by Continental Union executing mortgages to E. L. Lockhart and Hildah W. Lockhart in the total amount of $245,064. Continental Union assumed two outstanding mortgages on such property, each in the amount of $2,093.95 and Continental

Union paid to such sellers cash in the amount of $8,436. The next day, June 15, 1954, Francis J. Knoll caused ICT Insurance to purchase this property from Continental [fol. 202] Union with ICT Insurance paying Continental Union a total consideration of $500,000. ICT Insurance was caused to pay this total consideration of $500,000. by ICT Insurance assuming the two outstanding mortgages that had been executed by Continental Union to the sellers in the amount of $245,064. and by ICT Insurance issuing its check to Continental Union in the amount of $254,936. Therefore, ICT Insurance was caused to pay to Continental Union the amount of $242,312.10 in cash more than Continental Union had paid for such property the day before. That through such dishonest and fraudulent acts of Ben Jack Cage and Francis J. Knoll in causing ICT Insurance to pay to Continental Union such cash in the amount of $242,312.10 more than Continental Union had paid for such property constituted a conversion, misappropriation and swindle of such amount of cash of ICT Insurance by Ben Jack Cage, Francis J. Knoll and Continental Union for which amount the Receiver herein sues to recover.

198.

Ben Jack Cage and Francis J. Knoll caused to be entered in the books, records and Annual Statement of ICT Insurance, such property at such fictitious value of $500,000., thereby falsely showing that ICT Insurance possessed $242,312.10 more assets than it actually had. Through such dishonest and fraudulent acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duty to ICT Insurance and aided, abetted and furthered the conspiracy of falsifying ICT Insurance financial condition in order to keep ICT Insurance operating in violation of law.

199.

ICT Insurance Company's last examination was made as of June 30, 1952. Under Article 1.15 of the Texas Insurance Code, the Chairman of the Board of Insurance Commissioners was required, once in each two years or

oftener if he deemed necessary, in person, or by one or more examiners commissioned by him in writing, to examine each insurance company organized under the laws [fol. 203] of the State of Texas as to its financial condition in its ability to meet its liabilities as well as its compliance with the laws of Texas affecting the conduct of its business. Since ICT Insurance had last been examined as of June 30, 1952, under such law it was required to be again examined not latter than June 30, 1954. In anticipation of an examination as of such date of June 30, 1954, Ben Jack Cage, John G. Vaughan and Francis J. Knoll again entered into fictitious transactions in order to further falsify ICT Insurance Company's financial condition so that an examination as of June 30, 1954 would reflect a better financial condition than ICT Insurance was actually in.

200.

In anticipation of the examination of ICT Insurance as of June 30, 1954, Ben Jack Cage, in order to bolster the admissible assets of ICT Insurance as of such date, entered into the following transaction: As of June 30, 1954, JACCO of Texas owed to ICT Insurance monies which as an agent Ben Jack Cage had collected from local agents and general agents as premiums on insurance policies of ICT Insurance that had been sold. Instead of, upon collection, paying such money over to ICT Insurance, JACCO of Texas had used such monies for its own individual use and benefit. Under the law, agent's balances over 90 days old due an insurance company are non-admissible assets. Since some of such balances were over 90 days old, Ben Jack Cage caused JACCO of Texas to borrow $240,000. from United Corporation, a private corporation owned or controlled by Ben Jack Cage. One June 30, 1954, the same date that such loan was obtained, such $240,000. with other monies were paid over to ICT Insurance by Ben Jack Cage in payment of such monies due ICT Insurance. Subsequent to June 30, 1954, and during the month of July 1954, Ben Jack Cage repaid such $240,000. loan to United Corporation with subsequent premiums that he had collected from agents of ICT Insurance. Through such transaction, and in anticipation of such examination report, Ben Jack

Cage caused ICT Insurance to temporarily show that the [fol. 204] balances as between JACCO of Texas and ICT Insurance were current.

201.

In further anticipation of such examination report, in order to paint a better financial picture of ICT Insurance Company's financial condition as of June 30, 1954, the following transactions were engineered and carried out by Ben Jack Cage and Francis J. Knoll: At this time, Continental Union owed ICT Insurance reinsurance balances. Again, in order to attempt to show these balances were current, and therefore admissible assets, such balances from Continental Union owed to ICT Insurance were reduced by $75,000. by bookkeeping entries whereby it was shown that Continental Union had paid to ICT Insurance $75,000. on account at the same time that there was caused to be entered on the records of ICT Insurance a $75,000. increase in the value of the ICT Life stock owned by ICT Insurance. No additional shares of stock of ICT Life were transferred to ICT Insurance in connection with this transaction. Through such subterfuge, ICT Insurance was caused to show its accounts receivable from Continental Union in a more current condition and ICT Insurance was falsely caused to show in its records that the ICT Life stock was an asset worth $75,000. more than it had been carried by ICT Insurance. At the time that this transaction was entered into and carried out, Ben Jack Cage and Francis J. Knoll knew that the ICT Life stock was not worth such additional amount of $75,000. Ben Jack Cage and Francis J. Knoll entered into and carried out this transaction in order to create additional assets in ICT Insurance and to show that it was in a solvent financial condition in anticipation of an examination as of June 30, 1954 to further the conspiracy in keeping ICT Insurance operating in violation of law.

202.

Although such transactions were entered into in anticipation of an examination as of June 30, 1954, Ben Jack Cage did not want an examination of ICT Insurance be made

[fol. 205] by reason of the fact that ICT Insurance was in a hopelessly insolvent condition, and furthermore, by the Texas Insurance Department's making such an examination of ICT Insurance, examiners of other states in which ICT Insurance was doing business might possibly desire to participate in the making of such examination. Therefore, to prevent such examination from being made, Ben Jack Cage induced Garland A. Smith and J. Byron Saunders not to make such examination of ICT Insurance although it was their duty under Article 1.15 of the Insurance Code to make such examination. The payments of $500.00 per month in the form of bribes to J. Byron Saunders were continued and the $700.00 per month payment to Max Wayne Rychlik for the benefit of Garland A. Smith were continued as an inducement to Saunders and Smith not to make such examination, all of which acts aided and furthered the conspiracy.

203.

To further the conspiracy, the following transaction was entered into in order to falsify ICT Insurance Company's financial condition: In August 1952, ICT Insurance was caused to purchase two adjoining tracts of land fronting on the Central Expressway, Dallas, Texas, at a total cost of $149,345. During 1952 and 1953, Ben Jack Cage contemplated having ICT Insurance build a home-office building on such property, and in pursuance to such plan, caused ICT Insurance to expend $78,750. of ICT Insurance Company's assets for architectural plans for such building. In 1953, the plans for building such home-office building were abandoned when the ICT Building was purchased as hereinbefore alleged. Therefore, in 1954, when such $78,750. was finally paid by ICT Insurance to such architects, Ben Jack Cage caused ICT Insurance to add such expenditures for architectural fees to the value of the land in the books and records of ICT, thus showing a total value of such property of $228,395. On December 15, 1954, such property was allegedly sold to United Corporation for an alleged consideration of $228,395. Such considera-
[fol. 206] tion was allegedly paid by United Corporation to ICT Insurance as follows: Upon ICT Insurance Com-

pany's conveyance of such land to United Corporation, a Ben Jack Cage-controlled company, ICT Insurance received a $100,000. mortgage on one of the tracts of land, executed by United Corporation, and allegedly received cash from Continental Union Life in the amount of $128,395. in connection with a transaction that will be hereinafter alleged. In connection with Continental Union Life allegedly paying to ICT Insurance $128,395. cash, United Corporation executed to Continental Union Life, a mortgage in the amount of $130,000. on the other tract of land. Therefore, the total consideration paid by United Corporation for such property was the execution of two mortgages: One to ICT Insurance in the amount of $100,000. on one tract, and one to Continental Union Life in the amount of $130,000. on the other tract.

204.

At the time that such transaction was entered into and carried out, Ben Jack Cage and Francis J. Knoll knew that the tract of land upon which the $100,000.00 mortgage was issued to ICT Insurance was not worth 40 per cent more than such value of the $100,000.00 mortgage and that furthermore as will hereinafter be more fully alleged, ICT Insurance did not actually receive the alleged cash consideration supposedly paid by Continental Union Life to ICT Insurance in the amount of $128,395.00 because such alleged cash consideration was later substituted with worthless securities as a part of $625,000.00 year-end asset substituting transaction as between ICT Insurance and Continental Union Life, JACCO of Texas and ICT Corporation in order to falsify ICT Insurance Company's December 31, 1954 annual statement as will be hereinafter more fully pleaded. Through such fraudulent acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duties to ICT Insurance and aided, abetted and furthered the conspiracy.

[fol. 207] 205.

In September 1954, JACCO of Texas, the entire ICT Group as well as ICT Insurance as hereinbefore shown,

were insolvent and in order for JACCO of Texas to pay off its obligations to the various companies in the ICT Group and in order to attempt to take out worthless assets in ICT Insurance, Ben Jack Cage, Francis J. Knoll and Frank G. Newman entered into the following scheme in order to create fictitious assets to use for such purposes: In September 1954, Ben Jack Cage, Francis J. Knoll, Frank G. Newman, Charles D. Dunne, James E. Dunne, II, Henry J. Stites and the Bankers Bond Company of Louisville, Kentucky, entered into a scheme whereby JACCO of Texas could allegedly purchase $2,000,000.00 worth of Water Works, Sewer, Drainage and Street Revenue Bonds of the City of West Buechel, Jefferson County, Kentucky, with a down-payment of only $335,000.00 cash and the execution of a note for the balance, in order that JACCO of Texas could therefore with such $335,000.00 down-payment, create assets in the alleged amount of $2,000,000.00 and could then use such $2,000,000.00 worth of City of West Buechel Revenue Bonds at their face value in payment of various balances JACCO of Texas owed to various companies in the ICT Group and could use such bonds at their face value to substitute for other worthless assets carried by ICT Insurance. This scheme was carried out in the following manner:

206.

On or about September 6, 1954, Henry J. Stites and the Bankers Bond Company caused the City of West Buechel to float a $2,000,000.00 Water Works, Sewer, Drainage and Street Revenue Bond issue. As the alleged consideration for such $2,000,000.00 of City of West Buechel Bonds, it was agreed by and between the parties that Ben Jack Cage and/or JACCO of Texas would pay $2,160,000.00. This consideration was allegedly paid by a payment of cash in the amount of $335,000.00 and by the execution of a promis- [fol. 208] sory note by JACCO of Texas in the amount of $1,725,000.00, payable in seven equal annual installments, with interest at the rate of five per cent per annum. In connection with such promissory note, on September 6, 1954, JACCO of Texas as principal, with Continental Union

as surety, executed a surety bond to the Bankers Bond Company as agents for the City of West Buechel to guarantee the payment of the promissory note of JACCO of Texas. It was also agreed that as a part of the consideration of $2,160,000.00, JACCO of Texas would pay $100,000.00 to Charles D. Dunne and James E. Dunne, II, who were the alleged brokers in such transaction.

207.

The cash consideration of $335,000.00 was paid by JACCO of Texas issuing its draft in the amount of $335,000.00, payable to the Bankers Bond Company, drawn on the Republic National Bank of Dallas, Texas. When the draft was presented to JACCO of Texas through the Republic Bank, this $335,000.00 draft was paid with a check and/or cash of ICT Insurance in the amount of $232,000.00, and a check of JACCO of Texas in the amount of $103,000.00. Of this $335,000.00 received by the Bankers Bond Company, $60,000.00 of such money was paid to the Bankers Bond Company as an alleged brokerage fee for the part that it played in aid of and participation in the scheme. ICT Insurance was caused to show in its books that as consideration for the issuance of its $232,000.00 check which was used in part to pay such down-payment of $335,000.00, that ICT Insurance received City of West Buechel Bonds at the par value of $215,000.00. That furthermore, Ben Jack Cage caused ICT Insurance to disburse on November 29, 1954, $10,000.00 to JACCO of Texas to purchase $10,000.00 Dunne Press Bonds, which $10,000.00 was used as part payment to Charles D. Dunne and James E. Dunne, II, on the $100,000.00 alleged broker's fees that JACCO of Texas as hereinabove alleged agreed to pay such defendants for their aid and participation in the scheme. At [fol. 209] the time of the execution of such note of $1,725,000.00 JACCO of Texas was insolvent and couldn't pay such note and never paid such note or the full consideration of $2,160,000.00 for the $2,000,000.00 par value bond issue of the City of West Buechel; furthermore, at the time that the surety agreement was executed by Continental Union, Continental Union under its charter had no authority to

execute such surety agreement and further, Continental Union was insolvent and couldn't have performed under such surety agreement upon default of JACCO of Texas.

208.

Of the $2,000,000.00 of City of West Buechel bonds, in 1954, ICT Insurance was caused to accept $1,198,000.00 of such bonds at par value at a cost of $1,293,640. ICT Insurance was caused to accept such amount of Bonds in lieu of the $232,000.00 cash as hereinbefore alleged and as alleged payments on reinsurance and as substitutions for other worthless assets carried by ICT Insurance as follows:

(a) ICT Insurance was caused to accept $185,000.00 par value at a cost of $199,800.00, City of West Buechel, Kentucky, Revenue Bonds, from JACCO of Texas as a reduction of the collateral loan held by ICT Insurance executed by Alamo Motor Lines hereinbefore alleged.

(b) ICT Insurance was caused to accept as a payment on reinsurance balances due ICT Insurance from Continental Union $75,000.00 par value, City of West Buechel, Kentucky, Revenue Bonds, at a cost of $81,000.00.

(c) ICT Insurance was caused to accept City of West Buechel, Kentucky, Bonds at the par value of $602,000.00, cost $650,160.00, as payment or exchange with JACCO of Texas for worthless stock of Continental Union Insurance Company at an alleged value of $650,000.00.

(d) ICT Insurance was caused to accept City of West Buechel Revenue Bonds at the par value of $28,000.00, cost $30,240.00, as a payment on the sale of or exchange of with JACCO of Texas, ICT Corporation Class A, common stock, [fol. 210] at an alleged value of $30,000.00.

(e) ICT Insurance was caused to accept $93,000.00 par value, City of West Buechel, Kentucky, Revenue Bonds at a cost of $100,440.00 by ICT Insurance entering in its books an amount of $100,440.00 due to JACCO of Texas through its management commission account. Of the total amount of West Buechel Bonds in the amount of $1,293,640.00 that

ICT Insurance was caused to accept in 1954, ICT Insurance was caused to carry in its annual statement as an asset, the amount of $736,000.00 of such bonds at par and at a cost of $794,680.00, and as an admissible amortized asset value of $794,523.34. The rest of such bonds were taken out of the assets of ICT Insurance over the year-end for statement purposes in an $81,000.00 transaction with A.R.A. Manufacturing Company and a $625,000.00 year-end transaction with Continental Union Life, which transactions will hereinafter be more fully pleaded.

209.

Through such fraudulent acts hereinbefore alleged, Ben Jack Cage, Francis J. Knoll, Frank G. Newman, Henry J. Stites, Charles D. Dunne, James E. Dunne, II, JACCO of Texas and the Bankers Bond Company converted and misappropriated and/or joined and aided in the conversion and misappropriation of ICT Insurance Company's cash assets in the amount of $232,000.00. That furthermore, through such fraudulent acts, these defendants joined, aided, and abetted the falsifying of ICT Insurance Company's records, books and annual statement in causing ICT Insurance to show that it had assets in the form of such worthless bonds in the amount of $794,523.34 as of December 31, 1954, and through such transactions hereinabove alleged, Ben Jack Cage, Frank G. Newman and Francis J. Knoll as officers and/or directors, breached their fiduciary duties to ICT Insurance and such other defendants joined [fol. 211] and aided in such breach of duty and all these defendants joined, aided and furthered the conspiracy in keeping ICT Insurance operating in violation of law.

210.

To further the conspiracy in falsifying ICT Insurance Company's annual statement as of December 31, 1954, Ben Jack Cage, Francis J. Knoll and A.R.A. Manufacturing Company entered into a scheme whereby for year-end statement purposes, $81,000.00 worth of City of West Buechel Bonds were substituted over the year-end for cash. This transaction occurred in the following manner: On Decem-

ber 31, 1954, ICT Insurance allegedly transferred to A.R.A. Manufacturing Company $75,000.00 par value of City of West Buechel Bonds for cash in the amount of $81,000.00. Such cash in the amount of $81,000.00 was on the same date, December 31, 1954, deposited in ICT Insurance Company's bank account and was carried as a cash asset in ICT Insurance Company's annual statement as of December 31, 1954. On January 4, 1955, this transaction was reversed by A.R.A. Manufacturing Company allegedly transferring back to ICT Insurance the $75,000.00 par value bonds of the City of West Buechel in exchange for ICT Insurance Company's check in the amount of $81,000.00.

211.

At the time that such transaction was entered into, Ben Jack Cage, Francis J. Knoll and A.R.A. Manufacturing Company knew and/or were charged with knowledge that such transaction was a year-end transaction entered into for the purpose of falsifying ICT Insurance Company's annual statement in order to show that ICT Insurance had an admissible asset in the form of cash in the amount of $81,000.00. These defendants knew and are charged with knowledge that the City of West Buechel Bonds were worthless and were not an admissible asset and that this transaction was a subterfuge to temporarily substitute cash in the amount of $81,000.00 for the worthless bonds of the [fol. 212] City of West Buechel in order to falsify ICT Insurance Company's annual statement as of December 31, 1954. Such fraudulent acts of such defendants furthered, aided and abetted the conspiracy.

212.

To further the conspiracy in falsifying ICT Insurance Company's annual statement as of December 31, 1954, in order to show a solvent condition, Ben Jack Cage, Francis J. Knoll, Continental Union Life and ICT Corp. entered into a temporary year-end transaction in order to show that ICT Insurance had assets in the amount of $625,000.00 in the form of cash and/or U. S. Treasury Bills and U. S. Treasury Bonds more than it actually possessed. This

transaction was carried out in the following manner: On December 20, 1954, JACCO of Texas, through its officers Ben Jack Cage and Francis J. Knoll, borrowed $425,000.00 from the Mercantile Bank and put up as security therefor, $450,000.00 par value U. S. Government Bonds of Continental Union Life. On the same date, the $425,000.00 was paid over to Continental Union Life by JACCO of Texas and for such $425,000.00, Continental Union Life executed to JACCO of Texas its surplus notes and/or premium income certificate payable to JACCO of Texas in the amount of $425,000.00, and on the same date, December 20, 1954, ICT Corp. issued its check in the amount of $225,000.00 to Continental Union Life in exchange for a surplus note and/or a premium income certificate issued by Continental Union Life payable to ICT Corp. On December 30, 1954, $625,000.00 of such $650,000.00 received by Continental Union Life was paid over to ICT Insurance. In exchange for this $625,000.00, ICT Insurance was caused to allegedly transfer to Continental Union Life:

(a) City of West Buechel, Kentucky, Revenue Bonds at a cost of $388,800.00.

(b) Alamo Motor Lines' collateral loan in the principal amount of $107,936.40.

[fol. 213] (c) A credit to Continental Union Life in the amount of $128,395.00 for the Mortgage on Central Expressway, Dallas, Texas, property sold by ICT Insurance to United Corporation as hereinbefore alleged.

(d) The remaining $131.40 was entered in the books of ICT Insurance as an accounts receivable from Continental Union Life. At this point, ICT Insurance was enabled to substitute $625,000.00 cash for these questionable and worthless assets, all of which have been hereinbefore alleged. A portion of such cash was used by ICT Insurance to purchase $350,000.00 U. S. Treasury Bills and Bonds for year-end purposes, which cash and Bonds totalling $625,000.00 were carried as a free and unencumbered asset in ICT Insurance Company's December 31, 1954 annual statement.

213.

On January 4, 1955, the transaction was reversed by ICT Insurance selling such bonds and depositing the proceeds in ICT Insurance Company's bank account and then issuing its check to Continental Union Life in the amount of $525,000.00, and subsequently taking back these same assets or other assets of questionable value. This $525,000.00 was deposited to the account of Continental Union Life in the Mercantile Bank. On the same date, January 4, 1955, Continental Union Life issued its check to JACCO of Texas in the amount of $425,755.56, being the principal and interest due to the Mercantile Bank by JACCO of Texas on the $425,000.00 loan of December 20, 1954. This $425,755.56 check was deposited in JACCO of Texas' account in the Mercantile Bank and on the same date, JACCO of Texas issued a check in this amount to the Mercantile Bank in payment of the loan. On January 5, 1955, Continental Union Life issued its check in the amount of $225,375.00 to ICT Corp. for the alleged repayment of its surplus note plus interest payable to ICT Corp., thus completing the cycle of the $625,000.00 check and asset-kiting transaction.

[fol. 214]

214.

At the time that such transaction was entered into, Ben Jack Cage, Francis J. Knoll, ICT Corp. and Continental Union Life knew and or were charged with knowledge that the whole transaction was merely a year-end window dressing transaction to falsify the annual statements of ICT Insurance. These defendants knew that the $625,000.00 worth of securities that the $625,000.00 was substituted for in ICT Insurance for such year-end statement purposes, were worthless, and or inadmissible assets in ICT Insurance. This entire year-end kiting transaction was entered into for the purpose of and had the effect of falsifying ICT Insurance Company's annual statement as of December 31, 1954, in the amount of $625,000.00. Through such fraudulent acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duties to ICT Insurance and ICT Corp. and Continental Union Life joined and aided in such

breach of duty, and all these defendants joined, aided, abetted and furthered the conspiracy in keeping ICT Insurance operating in violation of law by falsifying its December 31, 1954 annual statement.

215.

In order to create additional fictitious assets and put them in ICT Insurance in order to cover up ICT Insurance Company's insolvent condition, and further, in order to create fictitious assets in ICT Insurance in order to cover up its insolvent condition so that Continental Union could purportedly carry the unearned premium reserve and loss reserve of ICT Insurance under the fictitious treaties hereinabove alleged, the following transaction was entered into and carried out by Ben Jack Cage, Francis J. Knoll and Frank G. Newman: Some time in January 1955, negotiations were entered into as between Frank G. Newman, Ben Jack Cage and Francis J. Knoll with Cumberland Apartment Company, a corporation of Louisville, Kentucky, which corporation owned an apartment building in Louis- [fol. 215] ville, Kentucky, and Henry J. Stites, the attorney for such company, and Charles D. Dunne for Continental Union Life Insurance Company to give Cumberland Apartment Company $135,000.00 cash together with six premium income notes of Continental Union Life, each in the principal amount of $77,500.00, or premium income notes in the total amount of $465,000.00, all of which cash and premium income notes totaled $600,000.00, in exchange for $600,000.00 in Mortgages of Cumberland Apartment Company. It was further understood as part of such negotiations that JACCO of Alabama as principal, with ICT Insurance as surety, would unconditionally guarantee the $465,000.00 premium income notes executed by Continental Union Life Insurance Company to Cumberland Apartment Company. Although the transaction was not to be consummated until some time in February 1955, it was part of the overall plan and scheme that the mortgage and premium income notes would be dated back to December 28, 1954, in order that Continental Union Life or the other insurance companies that such mortgages of Cumberland Apartment Com-

pany would be transferred to could carry such mortgages as assets in their December 31, 1954 annual statements.

216.

In carrying out such scheme and plan, on February 10, 1955, Frank G. Newman prepared the six premium income notes, the surety bond to be executed by JACCO of Alabama as principal and ICT Insurance as surety and various certificates and resolutions that were to be executed in connection with such transaction and submitted them to Francis J. Knoll for execution. On the same date, after Francis J. Knoll had such instruments executed, they were returned to Frank G. Newman who forwarded such instruments to Charles D. Dunne at the Dunne Press, Louisville, Kentucky, together with a cashier's check in the amount of $135,000.00 issued by the Mercantile Bank payable to the Dunne Press. This cashier's check was pur-
[fol. 216] chased with a check of Continental Union Life on February 10, 1955.

217.

The Cumberland Apartment Company decided not to go through with the transaction, and on February 21, 1955, a meeting was held as between Henry J. Stites, Frank G. Newman, Ben Jack Cage and Charles D. Dunne, whereby it was agreed that since Continental Union Life had included the Cumberland Apartment Mortgages in its December 31, 1954, annual statement, it was agreed that Cumberland Apartment would technically exchange its $600,000. in mortgages for the $465,000.00 of premium income notes and the $135,000.00 cashier's check of Continental Union Life and simultaneously cancel such transaction with all parties being returned to status quo. Pursuant to such agreement, on February 23, 1955, such subterfuge of the technical execution and simultaneous reversal of such transaction was carried out in order that the fictitious Cumberland Apartment Mortgages could be carried as an alleged asset of Continental Union Life in its annual statement as of December 31, 1954.

218.

Not only were the fictitious Cumberland Apartment mortgages carried in Continental Union Life as an asset in the amount of $400,000.00, but such fictitious Cumberland Apartment mortgages were likewise carried as assets in ICT Insurance in its annual statement as of December 31, 1954, in the amount of $200,000.00 and were also used through fictitious bookkeeping entries to increase the assets of Continental Union in the amount of $400,000.00. These transactions occurred in the following manner: In January 1955, a journal entry was caused to be made in ICT Insurance Company's records whereby as of December 28, 1954, ICT Insurance allegedly exchanged with JACCO of Texas, $200,000.00 worth of Continental Union stock for $200,000.00 worth of the Cumberland Apartment mortgages. In January or February of 1955, there was caused to be entered in the books of Continental Union, bookkeeping entries show- [fol. 217] ing that on December 28, 1954, Cumberland Apartment mortgages had been contributed to Continental Union by JACCO of Texas. In connection with such transaction, as of December 28, 1954, Continental Union increased its surplus $200,000.00 and decreased a reinsurance balance receivable from Commercial and General in the amount of $200,000.00. Then, on or about December 28, 1954, there was caused to be entered in the books of Continental Union bookkeeping entries allegedly showing that Continental Union had transferred the $400,000.00 worth of Cumberland mortgages to Continental Union Life, and based upon such alleged transfer, increased the value of Continental Union Life stock that Continental Union held in such amount of $400,000. and that such fictitious $400,000.00 increase of Continental Union Life stock was carried in Continental Union's annual statement as of December 31, 1954. As hereinbefore alleged, as of December 31, 1954, Continental Union Life carried such $400,000.00 of fictitious mortgages of Cumberland Apartment in their annual statement as of December 31, 1954.

219.

By reason of such dishonest and fraudulent acts of Ben Jack Cage, Francis J. Knoll, Frank G. Newman, Henry J.

Stites, Charles D. Dunne, Cumberland Apartment Company and Continental Union Life Insurance Company, they joined, aided and abetted in falsifying ICT Insurance Company's annual statement as of December 31, 1954, in causing ICT Insurance to show that ICT Insurance had $200,000.00 of assets in excess of what it actually had; joined, aided and abetted in falsifying the annual statement of Continental Union in the amount of $400,000.00, showing that Continental Union had $400,000.00 in assets in excess of what it actually had; joined, aided and abetted in falsifying Continental Union Life's annual statement in the amount of $400,000.00 in showing that it had $400,000.00 more assets than it actually had. By virtue of such dishonest and fraudulent acts, Ben Jack Cage and Francis [fol. 218] J. Knoll breached their fiduciary duty to ICT Insurance and Henry J. Stites, Charles D. Dunne and Cumberland Apartment Company joined, aided and abetted such officers and directors in such breach of duty and all these defendants joined, aided and abetted the conspiracy in keeping ICT Insurance operating in violation of law.

220.

As hereinbefore alleged, on June 30, 1954, ICT Insurance Company's investment in the stock of ICT Life was blown up $75,000.00 in anticipation of an examination of ICT Insurance as of the date of June 30, 1954. Not only was ICT Insurance insolvent but at this time, its subsidiary, ICT Life, was likewise insolvent. In order to show a solvent condition in ICT Life so that ICT Life's stock could be carried as an asset in ICT Insurance, and further, in order to falsely increase the value of the ICT Life stock that ICT Insurance carried, the following temporary year-end transaction was engineered and carried out by Ben Jack Cage and Francis J. Knoll for the purpose of falsifying ICT Insurance and ICT Life's annual statements as of December 31, 1954, to show solvency of such companies in order that such companies could continue to operate for the forthcoming year. On December 15, 1954, ICT Insurance was caused to allegedly contribute to ICT Life 6,300 shares of common stock of ICT Corp. at an alleged value of $37.-

800.00 and 62,500 shares of the common stock of ICT Corp. at an alleged value of $350,000.00, or a total alleged value of $387,800.00. At the same time, ICT Insurance was caused to show on its books and records an increase of value of the ICT Life stock that ICT Insurance owned in the amount of $387,800.00, thereby bringing the total value of ICT Life stock carried by ICT Insurance in its books and annual statement as of December 31, 1954, to a total value of $710,707.92. There was not involved in this transaction the acquisition of additional stock of ICT Life by ICT Insurance.

[fol. 219] 221.

In March and April of 1955, this temporary year-end transaction was in part reversed by ICT Life paying to ICT Insurance $25,000.00 in cash, which ICT Insurance deposited in its bank account and ICT Insurance at the time of acceptance of such $25,000.00 from ICT Life was caused to decrease the value of ICT Life stock that it carried in such amount of $25,000.00. Further, after the year-end, ICT Life transferred back to ICT Insurance $200,401.60 of ICT Corp. stock that had been transferred to ICT Life in December 1954, at which time, ICT Insurance was caused to decrease the value of the stock that it held of ICT Life in such amount of $200,401.60.

222.

At the time that such scheme was entered into and carried out by Ben Jack Cage and Francis J. Knoll, these defendants knew that at this time, ICT Life was insolvent and its stock was worthless. Furthermore, these defendants knew that ICT Insurance was likewise insolvent. These defendants engineered and carried out this temporary year-end transaction in order that through the transfer of the securities as hereinabove alleged from ICT Insurance to ICT Life as a contribution to ICT Life in order that ICT Life could falsely represent in its annual statement that these assets transferred to it were its bona fide property free and unencumbered and ICT Life was solvent, when at the time these defendants knew that such assets were

just temporarily transferred over to ICT Life for statement purposes in order to show a solvent financial condition of ICT Life in its annual statement as of December 31, 1954, in order that ICT Insurance could carry the ICT Life stock and thereby show ICT Insurance solvent. Furthermore, through such transaction, these defendants caused ICT Insurance to fictitiously increase the stock that ICT Insurance owned in ICT Life in the amount of $387,800.00 to falsify ICT Insurance Company's annual statement as of December 31, 1954, in such amount in order to falsely [fol. 220] show a solvent condition of ICT Insurance. At the time that such transaction was entered into and carried out, these defendants knew that the stock of ICT Life that was carried in ICT Insurance Company's annual statement as of December 31, 1954, in the total amount of $710,707.92 was worthless and that the assets of ICT Insurance had been falsified in such amount. Through such acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duties to ICT Insurance and aided, abetted and furthered the conspiracy.

223.

To further the conspiracy, on December 31, 1954, ICT Insurance was caused to enter into another temporary year-end loan transaction with the Republic Bank in order to further the painting of a false financial picture of ICT Insurance Company's liquid and solvent condition in its annual statement as of December 31, 1954. In order to again convert instalment premium notes held by ICT Insurance into cash assets, on December 28, 1954, Ben Jack Cage and Francis J. Knoll entered into a transaction with the Republic Bank through its vice-president, Oscar C. Bruce, to obtain a loan in the name of ICT Insurance Company in the amount of $400,000.00 in order that ICT Insurance could show $400,000.00 cash assets in its annual statement as of December 31, 1954. On December 28, 1954, ICT Insurance was caused to execute its note to the Republic Bank in the amount of $400,000.00 with interest, at 4 per cent per annum, such loan to be due and payable after the year-end and on January 5, 1955. At the time that such transaction was entered into, it was understood

that the proceeds from the $400,000.00 loan to ICT Insurance would be deposited in the Republic Bank and that on January 5, 1955, such proceeds would be used to repay such loan. On the same date of December 28, 1954, an agreement was entered into whereby ICT Insurance pledged to the Republic Bank as security for such loan, $565,277.87 of the premium notes of ICT Insurance. On or about the same date, a sealed box containing such premium notes of [fol. 221] ICT Insurance were delivered to the Republic Bank.

224.

The $400,000.00 representing the proceeds from such loan was carried in ICT Insurance Company's books and annual statement as a cash asset, and the $400,000.00 note that was executed by ICT Insurance to the Republic Bank was not listed in ICT Insurance Company's books and annual statement as a liability, and furthermore, in ICT Insurance Company's annual statement as of December 31, 1954, $187,764.69 worth of such premium notes were carried as a free and unencumbered asset, although $165,277.87 worth of such premium notes of $187,764.69 so carried were on pledge with the Republic Bank as collateral for such note of ICT Insurance.

225.

On January 5, 1955, in conformity with the agreement with the Republic Bank, which was only five days after such note was made, ICT Insurance was caused to issue its check to the Republic Bank in the amount of $400,222.24, which amount represented the principal and interest due on such loan. Furthermore, on such date, the sealed and bound container containing the premium notes of ICT Insurance in the alleged amount of $565,277.87 was returned unopened to ICT Insurance.

226.

At the time that such transaction was entered into and carried out, the Republic Bank knew and was charged with knowledge that as of December 31, 1954, ICT Insurance was

required to file its sworn annual statement, showing its true solvent financial condition in order to enable it to continue to do business for the forthcoming year. The Republic Bank knew that this transaction, as were the previous transactions, was a year-end window dressing scheme for statement purposes of ICT Insurance. The Republic Bank knew that such loan transaction was entered into in order to aid in showing a better liquid and financial condition [fol. 222] in ICT Insurance Company's December 31, 1954 annual statement. The Republic Bank knew and was charged with knowledge that through such transaction, ICT Insurance could show that it had such cash represented by such loan in the amount of $400,000.00, free and unencumbered, when in truth and in fact, under the understanding with the Republic Bank, such $400,000.00 was encumbered by reason of the fact that it was earmarked for the repayment of such note of ICT Insurance after the year-end. The Republic Bank knew and was charged with knowledge that the transaction was entered into in order that ICT Insurance could carry such cash in the amount of $400,000.00 as a free and unencumbered asset and could further falsely represent in its annual statement that ICT Insurance owed no money to the Republic Bank on such loan transaction. Through such acts, the Republic Bank further aided and abetted the conspiracy by aiding in the falsifying of ICT Insurance Company's annual statement as of December 31, 1954. The defendants Ben Jack Cage and Francis J. Knoll, devised and carried out this scheme with the aid of the Republic Bank in order to falsify ICT Insurance Company's annual statement as of December 31, 1954. These defendants knew that the $400,000. which were carried in ICT Insurance Company's annual statement as a free and unencumbered asset, were the proceeds from such loan and that such cash was deposited in the Republic Bank and was earmarked for the repayment of such loan. These defendants knew, that the sworn statement in ICT Insurance Company's annual statement that ICT Insurance owed no amount for borrowed money was false by reason of the fact that these defendants knew that as of December 31, 1954, ICT Insurance had an outstanding loan at the Republic Bank as hereinbefore alleged, in the amount of

$400,000.00. Furthermore, these defendants knew and/or were charged with knowledge that when ICT Insurance carried in its annual statement as of December 31, 1954, premium notes in the amount of $165,277.87 as a free and [fol. 223] unencumbered asset, that such premium notes were on pledge with the Republic Bank to secure ICT Insurance Company's $400,000.00 note and were therefore encumbered, contrary to such false statement. These defendants devised this scheme and carried it out with the aid of the Republic Bank as a year-end window dressing transaction in order to falsify ICT Insurance Company's annual statement, and through such fraudulent acts, induce the Board to renew ICT Insurance Company's Certificate of Authority and thereby permit ICT Insurance to continue to do business for the forthcoming year. By such wrongful acts, Ben Jack Cage and Francis J. Knoll breached their fiduciary duties to ICT Insurance Company and through such wrongful acts of the Republic Bank, the Republic Bank aided and abetted such officers and directors in the breach of their fiduciary duty to ICT Insurance, and the false, fraudulent, wrongful and illegal acts of all of these defendants, furthered, aided and abetted the conspiracy of keeping ICT Insurance operating in violation of law.

227.

By reason of the fact that the Republic Bank joined, aided and abetted ICT Insurance in representing in ICT Insurance Company's annual statement that the $400,000.00 proceeds from such loan were free and unencumbered assets of ICT Insurance, the Bank was estopped from contending otherwise, and when the Bank accepted the $400,000.00 from ICT Insurance in the repayment of such loan, such act constituted a conversion and misappropriation of ICT Insurance Company's assets in such amount of $400,000.00.

228.

As hereinbefore alleged, at year-end, December 31, 1953, ICT Insurance had in effect the fictitious bankers type treaties with Continental Union as well as the bankers type

treaties with Lloyds of London and other foreign companies and Guardian and the stop-loss agreements entered [fol. 224] into in connection therewith as between ICT Insurance and Lloyds of London and other foreign companies, ICT Insurance and Guardian, and Continental Union and Guardian. On March 31, 1954, the bankers type treaty as between ICT Insurance on the one hand and Lloyds of London and The London and Edinburg Insurance Company, Ltd. and the other foreign companies using Continental Union as a foil and the stop-loss agreements executed in connection therewith was cancelled. In connection with such alleged treaties, ICT Insurance paid direct to Stewart Smith and Company, brokers for Lloyds of London and The London and Edinburg Insurance Company, Ltd. $17,500.00, for such fictitious reinsurance transactions between ICT Insurance and Lloyds of London and The London and Edinburg Insurance Company, Ltd. using Continental Union as a subterfuge. That the payment of such amount of money to Stewart Smith and Company, brokers for and on behalf of Lloyds of London for Lloyds of London's and The London and Edinburg Insurance Company, Ltd.'s participation in such scheme, constituted a conversion and misappropriation of assets of ICT Insurance in the amount of $17,500.00 by Stewart Smith and Company of New York, Lloyds of London, The London and Edinburg Insurance Company, Ltd., Ben Jack Cage, and Francis J. Knoll for which amount the Receiver herein sues to recover.

229.

The alleged reinsurance treaties as between ICT Insurance and Guardian, and Guardian and Continental Union, and the stop-loss agreements executed therewith, were cancelled December 1, 1954. Upon such cancellation of such fictitious treaties, there was a receivable on such treaties from Guardian to ICT Insurance in the amount of $256,585.27. Such receivable was carried as an asset in ICT Insurance Company's annual statement as of December 31, 1954 in such amount. By virtue of the fact that fictitious stop-loss agreements were executed in connection [fol. 225] with such treaties, there was actually nothing due

from Guardian to ICT Insurance. That actually, under the terms of such agreements, the $256,585.27 was due from Continental Union to ICT Insurance and such asset was worthless by virtue of the fact that Continental Union was insolvent. That subsequently, through fictitious bookkeeping entries and settlement agreements, such receivable from Continental Union was wiped out and forgiven. At the time that the $256,585.27 was carried as an admissible asset in ICT Insurance Company's annual statement from Guardian, Ben Jack Cage and Francis J. Knoll knew that such receivable was not a receivable that ICT Insurance had from Guardian but was actually a receivable from Continental Union and that since Continental Union was insolvent, such receivable was worthless and not an admissible asset in ICT Insurance. Such acts of such defendants in falsifying ICT Insurance annual statement in such amount of $256,585.27 furthered, aided and abetted the conspiracy.

230.

As hereinbefore alleged, over the year-end 1953, ICT Insurance Company was allegedly ceding 50 per cent of its net liability to Continental Union after ICT Insurance Company's 25 per cent cession to Guardian and in turn, Continental Union was allegedly ceding a portion of the alleged 50 per cent quota share it assumed from ICT Insurance to Guardian and to Lloyds of London and The London and Edinburg Insurance Company, Ltd. and to the so-called Pool Number 1, which as hereinbefore alleged, consisted of Commercial and General and La Comercial. As hereinbefore alleged, the fictitious treaties between ICT Insurance on the one hand and Lloyds of London and The London and Edinburg Insurance Company, Ltd. on the other, using Continental Union as a foil, was cancelled as of March 31, 1954 and the Guardian transaction was cancelled as of December 1, 1954. The alleged treaties between Continental Union and Comercial and General and La Comercial under the Pool Number 1 arrangement were cancelled September [fol. 226] 30, 1954. At this point, ICT Insurance still had in effect the alleged 50 per cent bankers type quota share reinsurance treaty with Continental Union and through the

cancellation of the treaties hereinbefore discussed as between Continental Union, Comercial and General, La Comercial and Guardian, Continental Union had no reinsurance. The alleged 50 per cent cession from ICT Insurance to Continental Union, at this point, involved over $3,000,000.00 of unearned premium reserves and over $1,500,000.00 of loss reserves of ICT Insurance that Continental Union would have to set up as liabilities. Continental Union was insolvent and therefore could not even begin to carry such liabilities. Therefore, again, in order to get these liabilities out of Continental Union that Continental Union had taken over from ICT Insurance under the fictitious 50 per cent reinsurance treaty as between ICT Insurance and Continental Union, Ben Jack Cage and Francis J. Knoll with the aid of Stuart B. Hopps again approached Lloyds of London and other foreign companies through Stewart Smith and Company and John C. Paige and Company to again have such brokers and Lloyds of London and other foreign companies to enter into a scheme of fictitious reinsurance treaties as between ICT Insurance and Lloyds of London and such foreign companies, using Continental Union as a foil in order to evade and circumvent the insurance laws of Texas and through such fictitious treaties to make it possible for ICT Insurance to falsely represent in its annual statement as of December 31, 1954, that it had ceded over $3,000,000.00 of unearned premium reserve liabilities and over $1,500,000.00 of loss reserve liabilities to Continental Union and to aid Continental Union in falsely representing that in its annual statement as of December 31, 1954, it had retroceded substantially all of such liabilities on to Lloyds of London and such foreign companies so that Continental Union could falsely represent that it in its annual statement was in a solvent financial condition.

[fol. 227]

231.

As of September 1, 1954, ICT Insurance was caused to enter into a bankers type reinsurance treaty with Lloyds of London, London, England, Minster Insurance Company, Ltd., Midland Employers Mutual Assurance Ltd., The Orion Insurance Company, Ltd., Drake Insurance Company, Ltd.,

Sphere Insurance Company, Ltd., Insurance Corporation of Ireland, Ltd., Dublin, Ireland, Steadfast Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Sovereign Marine and General Insurance Company, Ltd., General Reinsurance Syndicate, Ltd., and Progress Insurance Company, Ltd., through John C. Paige and Company, and Underwriters at Lloyds, The London and Edinburgh Insurance Company, Ltd., London, England, and United Benefit Fire Insurance Company, Omaha, Nebraska, through Stewart Smith and Company. Under the terms of which reinsurance treaties which were executed as between ICT Insurance and such companies, such companies allegedly agreed to take a total of 38.95 per cent of ICT Insurance Company's net account (i.e., after deducting all reinsurance except this reinsurance). In other words, such companies were allegedly agreeing to reinsure 38.95 per cent of ICT Insurance Company's unearned premium reserve and loss reserves occurring after September 1, 1954, exclusive of other reinsurance that ICT Insurance had in effect. That in order to attempt to show that such treaties were not direct treaties as between ICT Insurance and Lloyds of London and such other foreign companies, there was stated in such treaties that such contract was reinsurance of Continental Union; however, it was further provided that it was distinctly understood that all matters pertaining to such contract shall be dealt with directly with the Insurance Company of Texas who shall be considered as the principal party in such matters. Furthermore, all of such treaties were bankers type reinsurance treaties under the terms of which Lloyds of London and [fol. 228] the other foreign companies who were parties to such treaties were in effect guaranteed that they would not share in any losses and, further, were guaranteed a five per cent profit on the earned premiums of ICT Insurance as consideration to such companies for their entering into such scheme.

232.

Based upon such fictitious treaties, ICT Insurance showed in its books and in its annual statement as of December 31, 1954, that it had ceded to Continental Union $3,811,-

631.50 in unearned premium reserve and $1,526,153.36 in losses. Continental Union in its records and in its annual statement as of December 31, 1954, showed that it had retroceded on to such foreign companies above named under such fictitious reinsurance treaties 38.95 per cent of the unearned premium reserve allegedly assumed from ICT Insurance or $1,524,652.60 through Stewart Smith and Company, and $1,444,608.34 through John C. Paige and Company, and losses in the amount of $236,547.28 through Stewart Smith and Company and $224,128.55 through John C. Paige and Company. Therefore, by virtue of such fictitious reinsurance bankers type treaty as between ICT Insurance and Lloyds of London and such other foreign insurance companies using Continental Union as a foil and as between Continental Union and ICT Insurance, ICT Insurance Company's annual statement as of December 31, 1954, was falsified to the extent of showing that ICT Insurance had $4,916,523.62 surplus more than ICT Insurance actually possessed.

233.

At the time that such fraudulent fictitious bankers type reinsurance treaties were entered into as between ICT Insurance and Lloyds of London and such other foreign insurance companies hereinabove named, such companies, John C. Paige and Company, Stewart Smith and Company, [fol. 229] Francis J. Knoll, Ben Jack Cage and Continental Union knew and/or were charged with knowledge that such transactions were entered into for the sole purpose of aiding ICT Insurance in obtaining surplus relief and thereby show a solvent financial condition. All of these defendants knew and/or were charged with knowledge that under the Texas law, Lloyds of London and these other foreign companies not being admitted to do business in Texas, ICT Insurance could not take credit in its annual statement for the unearned premium reserve and loss reserve ceded under any quota share reinsurance treaties with such companies. Such defendants further knew that such treaties were not bona fide quota share reinsurance treaties because under the terms of such treaties such foreign insurance companies did not share in the net loss to

ICT Insurance but to the contrary were guaranteed a net profit to enter into such fictitious treaties. All of these defendants entered into and joined, aided and abetted in such fictitious reinsurance treaties as between ICT Insurance on the one hand and Lloyds of London and such foreign companies on the other, using Continental Union as a foil, for the sole purpose and in order to circumvent the laws of Texas in order that it could be falsely represented that such treaties as were between ICT Insurance and Continental Union in order that ICT Insurance could falsely take credit for such unearned premium reserve and loss reserve in its annual statement. Furthermore, all of these defendants knew that such treaties were only year-end transactions for statement purposes in order to create a fictitious surplus in ICT Insurance and were cancelled after the year-end and on February 1, 1955. That by reason of such dishonest and fraudulent acts of Francis J. Knoll and Ben Jack Cage these officers and/or directors breached their fiduciary duty to ICT Insurance and by reason of the fraudulent acts of Continental Union, John C. Paige and Company, Stewart Smith and Company, [fol. 230] Lloyds of London, Minster Insurance Company, Ltd., Midland Employers Mutual Assurance, Ltd., the Orion Insurance Company, Ltd., Drake Insurance Company, Ltd., Sphere Insurance Company, Ltd., Insurance Corporation of Ireland, Ltd., Steadfast Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Sovereign Marine and General Insurance Company, Ltd., General Reinsurance Syndicate, Ltd., and Progress Insurance Company, Ltd., the London and Edinburgh Insurance Company, Ltd., and United Benefit Fire Insurance Company in aiding in participation of such transaction, they joined, aided and abetted such officers' and/or directors' breach of their fiduciary duty to ICT Insurance, in all of which, defendants, by virtue of their acts, aided, abetted and furthered the conspiracy in keeping ICT Insurance Company operating in violation of law.

234.

That under such fictitious reinsurance treaties, ICT Insurance paid directly to Lloyds of London and the other

foreign companies hereinabove named through their brokers, $21,567.16 to Stewart Smith and Company, and $17,718.95 to John C. Paige and Company, or a total of $39,286.11 for their aid in such fraudulent scheme, that such payments and acceptance of such payments constituted a conversion and misappropriation by such defendants of assets of ICT Insurance in such amount of $39,286.11 for which amount the Receiver herein sues to recover from such defendants.

235.

After having entered into such transactions, the annual statement of ICT Insurance as of December 31, 1954 was prepared under the direction and supervision of the officers and directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by Arthur B. Eaton as Vice-President, Stanley E. Prichard as Vice-President, and E. A. McSpadden as Secretary-Treasurer, and was filed with the Board in Austin, Travis County, Texas. The annual statement contained at least [fol. 231] the following false statements:

(a) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 9,256 shares of the capital stock of ICT Life at a value of $710,707.92, when in truth and in fact, such stock was worthless and was not an admissible asset.

(b) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance had 76,028 shares of the Class B non-voting common stock of ICT Corp. at the value of $432,196.80, when in truth and in fact, such stock was not an admissible asset and was not worth such value.

(c) On page 21, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 10 shares of the stock of United Metropolitan Corporation at the value of $1,000.00, when in truth and in fact, such stock was not an admissible asset.

(d) On page 20, schedule D, part 1, "Bonds Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned first mortgage bonds of Dunne Press at the value of $4,932.56, when in truth and in fact, such bonds were not an admissible asset and were worthless.

(e) On page 20, schedule D, part 1, "Bonds Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned free and clear of any encumbrance, U.S. Treasury Bills and/or Bonds in the amount of $350,000.00, and on page 30, schedule N, showing bank balances as of December 31 of current year, and on page 2, it was stated that ICT Insurance had on deposit free and unencumbered, $359,969.84 in the Mercantile Bank, when in truth and in fact, such statements were false by reason of the fact that as hereinbefore alleged in connection with the $650,000.00 asset substituting transaction as between ICT Insurance, Continental Union Life, JACCO [fol. 232] of Texas and ICT Corp., the $350,000.00 U.S. Treasury Bills and Bonds and $275,000.00 of such cash shown on deposit in the Mercantile Bank was only temporarily put into ICT Insurance for statement purposes and was not the free and unencumbered assets of ICT Insurance.

(f) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that as of December 31, 1954, ICT Insurance did not owe any amount for borrowed money, when in truth and in fact, as hereinbefore shown, on December 28, 1954, ICT Insurance was caused to execute its note to the Republic Bank in the amount of $400,000.00, which note was outstanding and unpaid as of December 31, 1954.

(g) On page 11, Exhibit 1, "Analysis of Assets as of December 31 of Current Year," and on page 2, under "Assets" it was stated that ICT Insurance had free and unencumbered, a net admitted asset in the form of premium installment notes (bills receivable taken from premiums) in the amount of $187,764.69, when in truth and in fact, $165,277.87 of such premium installment notes as here-

inbefore alleged were pledged with the Republic Bank as security on the December 28, 1954, $400,000.00 loan to ICT Insurance.

(h) On page 16, under schedule A, part 1, "Real Estate Owned as of December 31 of Current Year," and on page 2, it was stated that the ICT Building, Dallas, Texas, had a market value less encumbrances as an asset in the amount of $1,010,325.12, when in truth and in fact, such value was inflated in the amount of $152,500.00 as hereinbefore alleged by virtue of the fact that ICT Insurance had issued its surplus note and paid a consideration of $152,500.00 more than such building was actually worth.

(i) On page 16, under schedule A, part 1, "Real Estate Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned, as an admissible asset, the Florida Building at a market value less en-
[fol. 233] cumbrances in the amount of $279,171.51, when in truth and in fact, such value was inflated in the amount of $242,312.10 as hereinbefore alleged by virtue of the fact that ICT Insurance was caused to pay such amount more for such building than had actually been paid the day before by Continental Union to the original sellers of such building.

(j) On page 18, under schedule B, "Mortgages Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset a $100,000.00 mortgage on the Central Expressway Property, Dallas, Texas, when in truth and in fact, such mortgage was not worth $100,000.00 and was not an admissible asset as hereinbefore alleged.

(k) On page 18, under schedule B, "Mortgages Owned on December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset a $200,000.00 mortgage on the Cumberland Apartment, Louisville, Kentucky, when in truth and in fact, as hereinbefore alleged, such asset was worthless by reason of the fact that such alleged mortgage was not executed until February 1955 and in addition to that, such mortgage was not ever validly executed but the whole transaction concerning such

mortgage transaction was entered into as a subterfuge for the sole purpose of aiding ICT Insurance to falsely represent that it had such mortgage as an asset as of December 31, 1954, at the fictitious value of $200,000.

(l) On page 20, schedule D, part 1, "Showing all Bonds Owned December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset $794,523.34 of the City of West Buechel Bonds, when in truth and in fact, as hereinbefore alleged, such bonds were worthless and not admissible as an asset in ICT Insurance.

(m) On page 21, schedule D, part 2, "Showing all Stocks Owned December 31 of Current Year," it was stated that ICT Insurance owned as an admissible asset 80,000 shares [fol. 234] of the stock of A.R.A. Manufacturing Company, with a value of $200,000.00, when in truth and in fact, as hereinbefore alleged, such stock was not admissible asset of ICT Insurance.

(n) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had total liabilities of only $6,788,435.62, when in truth and in fact, such liabilities were greater in the amount of $615,463.81 by reason of the fact that as of December 31, 1954, ICT Insurance had outstanding its note to O. P. Leonard which ICT Insurance had executed to O. P. Leonard in the purchase of A. R. A. Manufacturing Company and which liability was not listed as a liability in ICT Insurance Company's annual statement.

(o) On page 30, schedule N, showing all bank balances as of December 31 of the current year, it was stated that ICT Insurance had on deposit in the Republic Bank as a free and unencumbered asset, cash in the amount of $627,110.85, when in truth and in fact, $81,000.00 of such cash was encumbered by reason of the fact that $81,000.00 of such cash had been temporarily put into ICT Insurance for year-end purposes in connection with the cash and asset substitution transaction as between ICT Insurance and A. R. A. Manufacturing Company as hereinbefore alleged.

(p) On page 25, under schedule F, part 1A, "Ceded Reinsurance as of December 31 of Current Year," it was stated

that ICT Insurance had ceded to Continental Union loss reserves in the amount of $1,526,153.36 and unearned premium reserve in the amount of $3,811,631.50, and on page 3, "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a surplus as regards policyholders in the amount of $3,268,502.41, when in truth and in fact, such statements were false by reason of the fact as hereinbefore alleged, the reinsurance treaty as between ICT Insurance and Lloyds of London and other foreign companies, and as between ICT Insurance and Continental Union were subterfuges and were worthless and therefore, [fol. 235] ICT Insurance Company's surplus was less in the amount of $1,715,234.18.

(q) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had surplus as regards policyholders in the total amount of $3,268,502.41 when in truth and in fact, by virtue of the fictitious reinsurance transactions as between ICT Insurance and Continental Union, there was created an amount due on reinsurance balances from Continental Union to ICT Insurance totaling $3,201,289.44, which balance was uncollectible and worthless as an asset in ICT Insurance Company's statement due to the fact that Continental Union was insolvent and did not have the assets with which to pay such liabilities to ICT Insurance, and therefore, ICT Insurance did not have surplus as regards policyholders in the amount of $3,268,502.41 as stated on page 3 of the annual statement for the reason that such surplus would be decreased in the amount of $3,201,289.44 by virtue of the fact that such receivable in such amount of $3,201,289.44 was worthless.

(r) On page 2, under "Assets," it was stated that ICT Insurance had an asset of $2,382,835.82 in the form of agent's balances on uncollected premiums, which asset included an alleged receivable from Guardian in the amount of $256,585.27 when in truth and in fact, as hereinbefore alleged, ICT Insurance did not have such receivable from Guardian, such receivable being from Continental Union and such alleged receivable was worthless as an admissible asset in such amount of $256,585.27.

(s) On page 4, under "Underwriting and Investment Exhibit Statement of Income as of December 31 of Current Year," it was stated that ICT Insurance had only a total underwriting loss of $373,503.87, when in truth and in fact, ICT Insurance had an additional underwriting loss of $705,399.04, or a total underwriting loss of $1,078,-902.91 by reason of the fact that the amount of $455,399.04 through fictitious and false bookkeeping entries and manip-[fol. 236] ulations was deducted from underwriting expenses incurred and listed as a stock sales expense under the "Capital and Surplus Account," on page 4 and $250,-000.00 through fictitious and false bookkeeping entries and manipulations was deducted from underwriting expenses incurred and carried as an investment expense under "Investment Income," on page 4, thereby giving a false picture of the underwriting operation of ICT Insurance during the year 1954.

(t) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that as of December 31, 1954, ICT Insurance had a capital of $1 [illegible]00,000.00 and unassigned funds or surplus in the amount of $1,768,502.41, or a total surplus as regards policyholders in the amount of $3,268,-502.41, when in truth and in fact, ICT Insurance had no capital and had no surplus and was hopelessly insolvent.

236.

During the year 1954, and at the time the December 31, 1954 annual statement of ICT Insurance was prepared, and at the time said statement was submitted to the Board of Insurance Commissioners, the following defendants were Officers and/or Directors and/or Trustees of ICT Insurance: Nile E. Ball, Ben Jack Cage, John G. Vaughan, Francis J. Knoll, Freeman Everett, William J. Harris, Marcus Loftis, Kenneth Mabry, M. M. McKnight, J. A. McMahon, Jr., Paul C. Sparks, J. H. Abright, Doris Baker, William A. Cullen, W. S. East, Eddie Gross, Charles Jones, P. C. Klein, Fred Lucas, W. C. McMasters, W. L. Pickens, C. R. Saunders, L. A. Townsend, J. M. West, Walter Wideman, Frank Yeager, Vernon Evans, E. C. Gones, Ray Johnson, Walton N. Newman, Frank Owens, Claude Ritchie, Bill

Sams, George Webber, Ed Weimar, T. W. Wheeler, C. L. Wisseman, Carl Knight, James J. Brophy, Steve Booke, C. O. Blackburn, Arthur B. Eaton, Stanley E. Prichard, [fol. 237] Frank G. Newman, E. A. McSpadden. At the time that these false, fraudulent and fictitious financial transactions were entered into, and at the time that the false statements were made in the annual statement, and at the time that such annual statement was submitted to the Board of Insurance Commissioners, each of these defendants either participated in such fraudulent transactions and/or knew and/or were charged with knowledge of the fraudulent aspects of such financial transactions and knew and/or were charged with knowledge that some or all of such statements were false, or as Officers and/or Directors, they negligently and carelessly permitted such fraudulent and fictitious transactions to be entered into and such statements to be made and submitted to the Board, when with ordinary care in exercising their care, as Officers or Directors, they could have, and should have, known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made, with the intent that the same should be submitted to the Board of Insurance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a Certificate, certifying that ICT Insurance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1955. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a Certificate of such Compliance would be circulated as required by law, and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders and stock subscribers that ICT Insurance had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and these classes of persons, and was a breach of such Officers' and Directors' fiduciary duty to ICT Insurance, [fol. 238] and were a part of and in furtherance of and in

aid of the conspiracy; that the hereinabove alleged acts of the persons and entities, hereinabove named, other than such officers and directors in entering into, aiding, participating and joining in the fraudulent acts hereinbefore alleged which were entered into to fictitiously increase ICT Insurance Company's assets and fictitiously lower its liabilities, such persons joined in, aided and abetted the Officers and Directors in the making of such false and fraudulent December 31, 1954 annual statement of ICT Insurance, and thereby aided, and abetted such Officers and Directors in the breach of their fiduciary duty to ICT Insurance; all of which acts were a part of and in furtherance of, and in aid of the conspiracy. The false statements in ICT Insurance Company's annual statement and submitted by its Officers to the Board were statements made directly to the Board, were statements made as to material facts and was, and were, relied upon by said Board as the truth, and did cause the Board to issue a Renewal Certificate of Authority to ICT Insurance to continue to do business in 1955, together with a Certificate of Publication which was published in two newspapers of wide circulation as required by law.

237.

To further the conspiracy, some time during the year 1955, after the annual statement was prepared and filed, and at an exact date well known to the defendants, a financial statement of ICT Insurance in pamphlet form was again prepared and widely distributed to the existing and prospective claimants, creditors, stockholders, insurance agents and policyholders of ICT Insurance. On the front of such pamphlet was a statement, "Statement of Condition—December 31, 1954—ICT Insurance Company." On one portion of the pamphlet was a financial statement showing ICT Insurance Company's assets and liabilities as of December [fol. 239] 31, 1954, to be the same as shown on pages 2 and 3 of ICT Insurance Company's December 31, 1954 annual statement in showing a capital of $1,500,000.00, unassigned surplus—$1,768,502.41 and surplus as regards policyholders; $3,268,502.41. Certain of the assets and liabilities used to make up such pamphlet statement to show such capital

and surplus were false for the same reason hereinbefore shown they were false in the December 31, 1954 annual statement of ICT Insurance. On one side of the financial pamphlet there was listed the names of the Officers and Directors.

238.

To further the conspiracy, financial pamphlets were again obtained from "Dunne's Insurance Report." The Dunne's Insurance Report was a concern in Louisville, Kentucky, operated and controlled by James E. Dunne, Charles D. Dunne and James E. Dunne, II. These pamphlets were obtained from such reporting concern by furnishing such concern the December 31, 1954 annual statement of ICT Insurance, and based upon which annual statement, James E. Dunne, Charles D. Dunne and James E. Dunne, II, caused such pamphlet statement to be prepared. The Dunne's Insurance Report, a so-called insurance rating concern in such pamphlet rated ICT: "A+ (Excellent) Dunne's Fire and Casualty Insurance Report 1955." Such pamphlet prepared and issued by Dunne's Insurance Report contained the following statements:

"FINANCE

Examination of the annual financial statement of The ICT Insurance Company as of December 31, 1954, reveals that assets had reached a total of $10,056,938. This is an increase of 29.1% over the previous year-end. These resources were distributed as follows: Cash, $1,193,573; U.S. Government bonds, $1,008,640; other high-grade bonds, $1,322,690; stocks, $1,481,110; real estate, $1,289,497; mortgage loans, $448,667; premiums in course of collection and not overdue, $2,382,836; interest due and accrued, $59,426, and all other assets, $870,499.

[fol. 240] LIQUIDITY

One of the most important considerations in the financial analysis of an institution of this nature, is the liquidity or quick availability of funds to meet unforeseen emergencies. This Company's cash, bonds,

stocks and premiums in course of collection, which we construe as liquid assets, amounted to $7,388,849 or 108.8% of total liabilities. In our opinion its liquid position is very good, and enables the Company to cope with contingencies promptly and without undue sacrifice of investment values.

Reserves

The Company had reserves set aside in the amount of $6,788,436, which is 67.5% of total assets. These reserves are maintained to provide for operating expenses and other obligations incurred during the current year. They are indicated as: loss and adjustment expenses, $1,601,153; premiums collected in advance but not yet earned, $3,811,632; taxes, $256,215, and all other liabilities, $1,119,436.

Solvency

After allocating funds to cover all obligations, known or anticipated, this Company held $3,268,502 or 32.5% of its resources as Surplus to Policyholders. This amount may be construed as a "Safety Fund" for the additional protection of policyholders. Comparison of total assets with all liabilities and reserves showed that the Company had $148.10 of assets for each $100 of liabilities. This margin of safety reflects a surplus position that is strong.

Underwriting

Net premiums written during the year were $6,273,809, while underwriting expenses amounted to $2,559,087 or 40.8% of premiums written. Earned premiums totaled $5,224,939 and expenses for loss and adjustments were $3,039,357, or 58.2% of earned premiums. Gain from investments was $117,386. Trading profit was equal to 1.0%.

Officers

President, Ben Jack Cage; Executive Vice President, Arthur B. Eaton; Vice Presidents, John G. Vaughan,

J. H. Abright, Stanley E. Prichard, Paul Sparks, Francis J. Knoll, William J. Harris, Jerry Holleman: Secretary and Treasurer, E. A. McSpadden.

RECOMMENDATION

Based on the foregoing analysis of its condition and affairs as of December 31, 1954, and appraisal of its management, we conclude that The ICT Insurance Company is worthy of public confidence and we so recommend it.'

[fol. 241]

RATING

Under the heading of "Stock Companies" in Dunne's Fire and Casualty Insurance Reports for 1955, the rating of this Company is A+ (Excellent)."

At the time that such statements were caused to be made by James E. Dunne, Charles D. Dunne and James E. Dunne, II, in such pamphlet, these defendants knew that ICT Insurance did not have assets in the total amount of $10,056,938.00 as stated in such report and knew that contrary to the above statements that ICT Insurance did not have "other high-grade bonds" in the amount of $1,322,690.00 which such pamphlet stated made a part of such total assets of $10,059,938.00 and did not have mortgage loans in the amount of $448,667.00 that made up such total of $10,056,938.00 in assets by reason of the fact as hereinbefore alleged, such so-called "high-grade bonds" were made up of the City of West Buechel Bonds in the amount of $794,523.34. James E. Dunne, Charles D. Dunne and James E. Dunne, II, knew, contrary to such statements made in such pamphlets, that such City of West Buechel Bonds were not an admissible asset in ICT Insurance and were worthless by reason of the fact as hereinbefore alleged, these defendants helped engineer and were a party to the fraudulent scheme of creating such fictitious assets in order to aid ICT Insurance, Ben Jack Cage and JACCO of Texas in using such fictitious assets for statement purposes. That furthermore, as hereinbefore alleged, these defendants as alleged brokers received consideration of $100,000.00 for their aid and participation in such scheme. That

furthermore, these defendants knew that such statement was false wherein it stated that ICT Insurance had mortgage loans in the amount of $448,667 by reason of the fact that included in such amount was the $200,000.00 alleged mortgage loan of Cumberland Apartments which these defendants knew was worthless and could not be used as an asset in ICT Insurance. That these defendants knew that such asset was worthless by reason of the fact that these defendants joined and aided in the fraudulent scheme of fictitiously creating such asset in 1955 so that it could be [fol. 242] used as an asset as of December 31, 1954. Furthermore these defendants knew that such other statements concerning ICT financial condition were false and ICT Insurance was not "worthy of public confidence" and was not entitled to a rating of "A (Excellent). That by reason of such fraudulent acts, these defendants joined, aided and abetted the officers and directors in the breach of their fiduciary duty to ICT Insurance and the acts of such defendants aided, abetted and furthered the conspiracy.

239.

That furthermore, these statements in such Dunne's Insurance Report as to ICT Insurance Company's total assets and total liabilities and the other statements made as to ICT Insurance Company's assets and liabilities and ICT Insurance Company's financial condition were false for the same reason as hereinbefore alleged, ICT Insurance Company's annual statement as of December 31, 1954, was false. These pamphlets obtained from the Dunne's Insurance Report were likewise distributed to the existing and prospective creditors, claimants, stockholders, insurance agents and policyholders of ICT Insurance.

240.

At the time the financial pamphlet prepared on behalf of ICT Insurance was made, published and distributed, and at the time that ICT Insurance Company's Annual Statement was submitted to the Dunne's Insurance Report and the Dunne Insurance Report pamphlet was obtained and widely circulated and distributed as hereinbefore alleged, each

of the defendants who were officers and directors as hereinbefore alleged knew that the statements were false or as officers and/or directors they negligently and carelessly permitted such false statements to be made and published when with ordinary care in exercising their duties as officers and/or directors they could have and should have [fol. 243] known the true facts. These defendants made and published, caused to be made and published, or negligently permitted to be made and published the financial statements with their name thereon and the Dunne's Reports with the purpose and intent that such statement be relied upon by existing and prospective innocent policyholders, creditors and stockholders to induce them to invest in ICT Insurance and to extend to ICT Insurance credit. Likewise, all of the defendants as hereinbefore alleged who participated in the false and fraudulent financial manipulations in aid of the creation of the false assets and concealment of liabilities, through such acts as hereinabove alleged, aided such officers and directors in the breach of their fiduciary duty in connection with the publication and issuance of such false financial pamphlets. These false representations were made as to material facts and were relied upon by the classes of person to whom they were made. Such wrongful acts were wrongs as against ICT Insurance and its claimants, creditors, policyholders and stockholders by reason of the fact that pursuant to such wrongful acts, ICT Insurance was caused to incur liabilities and obligations that it could not meet. Such wrongful acts by such defendants aided, abetted and furthered the conspiracy and became a part thereof.

241.

During the year 1955, ICT Insurance was caused to continue to sell and issue its insurance policies and thereby create additional liabilities over and above those ICT Insurance already had as hereinbefore shown and could not pay by reason of its insolvent condition. Again, in order to show that ICT Insurance had sufficient assets to meet its liabilities, additional fraudulent and illegal transactions and manipulations were entered into to cover up ICT Insurance Company's insolvent condition, all of which were

in furtherance of the conspiracy to keep ICT Insurance operating in violation of law.
[fol. 244]

242.

As hereinbefore alleged, the bankers type quota share reinsurance treaty entered into as between ICT Insurance and Lloyds of London and the other foreign companies using Continental Union as a foil was cancelled as of February 1, 1955, and thereafter, Continental Union allegedly carried ICT Insurance Company's reinsurance for its own account under the Bankers Type reinsurance treaty as hereinbefore alleged until August 31, 1955 at which time such treaty was cancelled and a new bankers type treaty was entered into. Continental Union was insolvent and therefore did not have the assets to back up the million dollars of reserve that Continental Union would have to have in order to create fictitious assets in Continental Union so it could be falsely represented that Continental Union was in a solvent condition and had sufficient surplus to carry the millions of dollars in reserve of ICT Insurance that ICT Insurance supposedly ceded to Continental Union in such reinsurance agreements, Ben Jack Cage, Francis J. Knoll, Continental Union, with the aid of Frank G. Newman, T. K. Irwin, Charles D. Dunne and James E. Dunne, II, entered into the following scheme and transaction:

243.

On or about March 10, 1955, Chapman College by its Chairman, J. E. Wilkinson, and Continental Union by Ben Jack Cage, its Vice-President, attested by its Secretary, Francis J. Knoll, entered into an agreement whereby Continental Union would allegedly pay over to Chapman College $675,000.00 and execute its premium income notes to Chapman College in the amount of $1,575,000.00 totaling $2,250,000.00 in exchange for first mortgage notes of Chapman College in the amount of $2,250,000.00 secured by deeds of trust on the property of Chapman College in Orange County and Los Angeles County, California. It [fol. 245] was further agreed in such agreement that Continental Union would furnish a surety bond in connection

with each premium income certificate issued by Continental Union with JACCO of Alabama as principal, and ICT Insurance as surety, guaranteeing the payment by Continental Union of the premium income certificates issued by it in the principal amount of $1,575,000.00, plus interest. In connection with such transaction, an agreement was entered into as between Continental Union Securities Corporation, a corporation controlled by Ben Jack Cage and C. D. Dunne and James E. Dunne, II, wherein it was agreed that as acting as so-called brokers in connection with the transaction, the Dunnes would be paid the sum of $64,375.00 for the part they played in the scheme.

244.

The agreement was carried out in the following manner: On March 1, 1955, Chapman College executed 15 first mortgage notes secured by 15 deeds of trust on the various parcels of property of Chapman College, totaling $2,250,000.00 to Continental Union through Continental Union Securities Corporation, a corporation controlled by Ben Jack Cage, which was used as a "front" in such transaction, such mortgages being payable in ten equal annual installments beginning March 1, 1956. The $675,000.00 down-payment was paid with a $425,000.00 check of National Banker's Life Insurance Company and the transferring of $250,000.00 worth of the Chapman College mortgages that Continental Union received to National Reserve Life Insurance Company, in exchange for National Reserve Life Insurance Company's cancellation of a first mortgage of approximately $250,000.00 that the National Reserve Life Insuranee Company held on the Chapman College property. The balance of the alleged consideration was paid by Continental Union's executing three premium income notes for each of the 15 Chapman College Mort- [fol. 246] gages or a total of 45 premium income notes aggregating $1,575,000.00 payable to Chapman College, to become due and payable in 1956 through 1961. ICT Insurance was caused to execute so-called surety bonds totaling 45 in number with JACCO of Alabama as principal and ICT Insurance as surety unconditionally guaranteeing

the payment by Continental Union to Chapman College of Continental Union's premium income notes aggregating $1,575,000.00. The effect of such surety agreement was that ICT Insurance was in effect caused to endorse Continental Union's premium income notes and to unconditionally guarantee the payment of Continental Union's liability to Chapman College under such premium income notes.

245.

The $2,250,000.00 Chapman College mortgages were placed in Continental Union's records as a free and unencumbered asset and no liability was recorded in Continental Union's books and records for the amount of $1,575,000.00 that was due by Continental Union to Chapman College under the premium income notes executed by Continental Union to Chapman College in connection with such transaction. Through such transaction, Ben Jack Cage, Francis J. Knoll, C. D. Dunne, James E. Dunne, II, Frank G. Newman, T. K. Irwin, Sr., and Continental Union joined, aided and abetted Continental Union in falsely and fictitiously increasing its assets in such amount of $1,575,000.00.

246.

At the time that such transaction was entered into, Ben Jack Cage, Francis J. Knoll, C. D. Dunne, James E. Dunne, II, Frank G. Newman, T. K. Irwin, Sr., and Continental Union knew and/or were charged with knowledge that the whole transaction was a subterfuge in order to create additional assets in Continental Union. Furthermore, these defendants knew and/or were charged with [fol. 247] knowledge that ICT Insurance was wrongfully caused to guarantee Continental Union's obligation under its premium notes to Chapman College in the amount of $1,575,000.00. That the execution of so-called surety bonds was in effect an endorsement by ICT Insurance of such premium notes of Continental Union and created at least a contingent liability in ICT Insurance which was not recorded in the books and records of ICT Insurance. At the time that such transaction was entered into, Francis

J. Knoll and Ben Jack Cage knew that Continental Union was insolvent and under the law should have been in receivership, and therefore, could not have fulfilled its obligations under such premium income notes. Such transaction was entered into for the sole purpose of creating fictitious surplus in Continental Union in order that Continental Union could allegedly carry the unearned premium reserve and loss reserve of millions of dollars of ICT Insurance under the fictitious reinsurance treaties as between Continental Union and ICT Insurance in order that through such fictitious reinsurance treaties such liabilities of ICT Insurance in the form of loss reserves and unearned premium reserves could be eliminated as liabilities of ICT Insurance and therefore, fraudulently show that ICT Insurance was in a solvent condition. By reason of such dishonest and fraudulent acts, Ben Jack Cage and Francis J. Knoll as officers and/or directors of ICT Insurance breached their fiduciary duty to ICT Insurance and by reason of their joining in and aiding in such fraudulent transaction, Frank G. Newman, Charles D. Dunne, James E. Dunne, II, Continental Union and T. K. Irwin aided and abetted such officers and/or directors in the breach of their fiduciary duties to ICT Insurance, all of which acts of such defendants aided, abetted and furthered the conspiracy in keeping ICT Insurance operating in violation of law although ICT Insurance was hopelessly insolvent and thereby caused ICT Insurance to continue to [fol. 248] operate in an insolvent condition in violation of law and to suffer further losses and incur further obligations that it could not pay.

247.

On December 31, 1955, Ben Jack Cage and James G. Cage caused ICT Insurance to accept Chapman College mortgages from Continental Union in the amount of $355,200.00 as an alleged payment on a reinsurance balance due from Continental Union to ICT Insurance, which mortgages of Chapman College in such amount of $355,200.00 were carried as an asset in ICT Insurance Company's annual statement as of December 31, 1955. At such time, Ben Jack Cage and James G. Cage knew that such

Chapman College mortgages were worthless as assets. Through such acts, Ben Jack Cage and James G. Cage breached their fiduciary duty to ICT Insurance and furthered, aided and abetted the conspiracy in falsifying ICT Insurance Company's financial condition to keep ICT Insurance operating in violation of law.

248.

In February 1955, another scheme was entered into to further falsify Continental Union's financial condition so that Continental Union could continue to allegedly carry ICT Insurance reinsurance and thereby falsify ICT Insurance financial condition. On or about February 10, 1955, Ben Jack Cage, the American Family Investment Corporation, a corporation controlled by Ben Jack Cage, and Continental Union entered into a transaction whereby all of the 70% interest of R. W. McDonnel and one third of the 30% interest of E. M. Bishop of the Lone Star Boat Company, which was a partnership, was purchased and for such interest, E. M. Bishop and R. W. McDonnel, were paid a total consideration of $1,012,000.00. This consideration consisted of $500,000.00 cash and the American Family [fol. 249] Investment Company's promissory notes guaranteed by Continental Union, executed to E. M. Bishop and R. W. McDonnel in the amount of $512,000.00. In connection with such transaction, on the 2nd day of February 1955, a charter amendment was obtained in JACCO of Delaware whereby the name of JACCO of Delaware was changed to the Lone Star Boat Manufacturing Company, Inc., and the capital was increased to 100,000 shares of stock at the par value of $10.00, aggregating a capital of $1,000,000.00. In connection with such charter amendment of JACCO of Delaware, on February 16, 1955, the American Family Investment Corporation transferred to Lone Star Boat Manufacturing Company, Inc., all of the property that American Family Investment Corporation had acquired or did acquire from E. M. Bishop and R. W. McDonnel, in consideration of Lone Star Boat Manufacturing Company, Inc., issuing to American Family Investment Corporation 80,000 common shares of stock at

the total par value of $800,000.00 and the issuance to American Family Investment Corporation of 10-year 3½ per cent debenture bonds of Lone Star Manufacturing Company, Inc., in the principal amount of $212,000.00. Lone Star Boat Manufacturing Company assumed the liabilities under the promissory notes in the amount of $512,000.00 executed by American Family Investment Corporation to E. M. Bishop and R. W. McDonnel that had been executed in the original purchase of Lone Star Boat Manufacturing Company, Inc., which notes to R. W. McDonnel and E. M. Bishop in the amount of $512,000.00 were assumed and guaranteed by Continental Union. At the same time, E. M. Bishop conveyed the twenty per cent interest of the partnership that he retained in the former partnership known as Lone Star Boat Manufacturing Company to Lone Star Boat Manufacturing Company, Inc., the Delaware corporation, in exchange for the issuance by [fol. 250] Lone Star Boat Manufacturing Company, Inc., to E. M. Bishop, of 20,000 shares of the $10.00 par value stock at a total value of $200,000.00 of Lone Star Boat Manufacturing Company, Inc., and the issuance by Lone Star Boat Manufacturing Company, Inc., to E. M. Bishop, of 3½ per cent debenture bonds of Lone Star Boat Manufacturing Company, Inc., in the aggregate principal amount of $353,000.00. Thereby, through such transaction, the 80 per cent of the partnership of Lone Star Boat Manufacturing Company that had been purchased by American Family Investment Corporation, and the 20 per cent of such copartnership that had been retained by E. M. Bishop was transferred to the Lone Star Boat Manufacturing Company, Inc., a Delaware corporation, in exchange for 100,000 shares of stock of Lone Star Boat Manufacturing Company, Inc., valued at $1,000,000. and debenture bonds of Lone Star Boat Manufacturing Company, Inc., at the value of $265,000.00, or a total value of $1,265,000.00.

249.

As hereinbefore alleged, during 1953 and 1954, Continental Union had been allegedly retroceding to Comercial and General reinsurance liabilities in the form of un-

earned premium reserve and loss reserves that Continental Union had assumed from ICT Insurance in order that through such fictitious transactions it could be represented in ICT Insurance Company's statement that ICT Insurance did not owe such losses and liabilities and thereby falsely represent ICT Insurance to be solvent. As hereinbefore alleged, such treaties as between ICT Insurance and Continental Union and Continental Union and Comercial and General were fictitious treaties; however, in order to attempt to lend such treaties validity, bookkeeping entries were maintained as between Continental Union and Comercial and General, and through which bookkeeping entries monies were allegedly due from Comercial and General to Continental Union in the amount of $1,959,790.91. The [fol. 251] largest portion of this $1,959,790.91 alleged receivable from Comercial and General to Continental Union was operating losses of ICT Insurance that had been hidden in Comercial and General. That in order to wipe out this fictitious receivable as between Comercial and General and Continental Union, on or about February 11, 1955, the 80,000 shares of the Lone Star Boat Manufacturing Company, Inc., of Delaware, and the $212,000.00 of debenture bonds of the Lone Star Boat Manufacturing Company, Inc., of Delaware, which had been issued to American Family Investment Corporation at the alleged par value of $1,012,000.00 was allegedly transferred to Comercial and General at no consideration, with Comercial and General allegedly transferring such stock and debenture bonds to Continental Union in payment of the alleged reinsurance balance owed by Comercial and General allegedly transferring such stock and debenture bonds to Continental Union in payment of the alleged reinsurance balance owed by Comercial General to Continental Union in the amount of $1,959,790.91. Continental Union, on its books, showed that through such transaction, the $1,959,790.91 receivable from Comercial and General had been paid and set up in their books the 80,000 shares of Lone Star Boat Manufacturing Company, Inc., and the $212,000.00 of debenture bonds of Lone Star Boat Manufacturing Company, Inc., at a value of $2,459,790.91. The $2,459,790.91 value placed on such 80,000 shares of stock

and debenture bonds of Lone Star Boat Manufacturing Company, Inc., was based upon the premise that Continental Union had paid such alleged value for such stock and bonds through the accepting of such assets in payment of the alleged reinsurance balance from Comercial and General to Continental Union in the alleged amount of $1,959,790.91 and the payment by Continental Union of $500,000.00 cash which was the cash down-payment made to E. M. Bishop and R. W. McDonnel in the original acquisition of the assets of the co-partnership.

[fol. 252]

250.

As hereinbefore alleged, the total consideration paid in the acquisition of assets of Lone Star Boat Manufacturing Company by Lone Star Boat Manufacturing Company, Inc., of Delaware, was the total value of $1,265,000.00, which was paid by the Delaware corporation issuing its 100,000 shares of stock at the value of $1,000,000.00 and issuing its debenture bonds in the amount of $265,000.00. Therefore, such 80,000 shares of Lone Star Boat Manufacturing Company, Inc., at the value of $800,000.00 and the $212,000.00 worth of debenture bonds received by Continental Union which represented only 80 per cent of such value did not have a greater value than $1,012,000.00. Furthermore, by reason of the fact that the Lone Star Boat Manufacturing Company, Inc., was caused to assume the indebtedness of $512,000.00 that was still due and owing to R. W. McDonnel and E. M. Bishop on the original acquisition of such co-partnership, and by reason of the fact Continental Union had also assumed and guaranteed such indebtedness, although such liability was not set up on Continental Union books, the 80,000 shares of stock and the $212,000.00 of debenture bonds did not even have the value of $1,012,000. in Continental Union. Therefore, at the time that such 80,000 shares of stock and $212,000.00 of debenture bonds was set up in Continental Union's assets at the total value of $2,459,790.91, Ben Jack Cage, Francis J. Knoll, Nile E. Ball and Continental Union knew that such assets were over-valued in the amount of more than $2,000,000.00.

251.

Ben Jack Cage, Francis J. Knoll and Nile E. Ball caused such fictitious entries to be made in Continental Union's books for the sole purpose of wiping out the fictitious reinsurance balances as between Comercial and General and Continental Union and further in order to create fictitious [fol. 253] assets in Continental Union without showing proper liabilities in order to falsely show that Continental Union was in a solvent financial condition in order that Continental Union could further allegedly carry ICT Insurance Company's reinsurance and through such means falsely show ICT Insurance solvent. The 80,000 shares of Lone Star Boat Manufacturing Company, Inc., stock was carried in Continental Union's books, records and annual statement as of December 31, 1955, at the blown-up value of $2,247,790.91 and such liability of $512,000.00 was not shown and such stock continued to be carried at such value until February, 1956, at which time, such stock was disposed of as will be hereinafter more fully alleged. Through such dishonest and fraudulent acts, Ben Jack Cage, Nile E. Ball and Francis J. Knoll breached their fiduciary duties to ICT Insurance and furthered, aided and abetted the conspiracy.

252.

On July 16, 1955, a joint meeting of the Board of Directors of ICT Insurance and Board of Directors and Stockholders of ICT Corp. was held at the Lazy C Ranch at Sugarland, Texas. At this time, based upon an audit made by Brophy Mimier and Company, Certified Public Accountants, the records of JACCO of Texas revealed that as agent for ICT Insurance under JACCO of Texas' management contract with ICT Insurance, JACCO of Texas owed ICT Insurance monies that JACCO of Texas had collected from the sale of stock of ICT Insurance in the amount of $977,632.52. At such meeting, a resolution was adopted by the directors of ICT Insurance whereby JACCO of Texas was forgiven such amount of $977,632.52 which JACCO of Texas owed to ICT Insurance from stock sales collections that JACCO of Texas had collected but had not

paid over to ICT Insurance. The Board of Directors voted on such forgiveness resolution and/or likewise signed a [fol. 254] stock sales settlement agreement as between JACCO of Texas by Ben Jack Cage, President, and ICT Insurance by Francis J. Knoll, Vice-President, in which stock sales settlement agreement such amount of $977,632.52 was forgiven JACCO of Texas. Such acts of such members of the Board of Directors in the forgiveness of JACCO of Texas of such amount of $977,632.52, constituted a gift of the corporate assets of ICT Insurance contrary to such directors' authority and in violation of their fiduciary trust to ICT Insurance and its creditors, claimants, policyholders, and stockholders and constituted a conversion and misappropriation of ICT Insurance Company's assets by such Directors and Ben Jack Cage and JACCO of Texas in such amount of $977,632.52, for which amount the Receiver sues to recover.

253.

On July 16, 1955, ICT Insurance owned the control of the entire ICT Group which was made up of the following principal companies: ICT Corp., ICT Life Insurance Company, A.R.A. Manufacturing Company, A.R.A. Sales and Service, Continental Union Insurance Company, Lone Star Boat Manufacturing Company, Inc., Alamo Motor Lines and Partner's Finance and National Bankers Life Insurance Company. ICT Insurance Company owned control of all of such companies in the ICT Group by reason of the fact that ICT Life and A.R.A. Manufacturing Company and ICT Corp. were direct subsidiaries of ICT Insurance Company. As hereinbefore alleged, in 1952, when ICT Corp. was organized, ICT Insurance Company put up the money for and purchased all of the common voting stock of ICT Corp., and from such date to July 16, 1955, owned all of such common voting stock of ICT Corp. That through the ownership of all of such common stock of ICT Corp., ICT Insurance Company controlled ICT Corp. and its sub- [fol. 255] sidiaries, of which the major ones were: A.R.A. Sales and Service, Continental Union Insurance Company, Lone Star Boat Manufacturing Company, Inc., Alamo

Motor Lines, Partner's Finance and National Banker's Life Insurance Company. As hereinbefore alleged, ICT Insurance Company was insolvent from its inception and all through its period of operation, Ben Jack Cage, John G. Vaughan, Nile E. Ball, Paul C. Sparks, William J. Harris and other officers and/or directors of ICT Insurance Company either knew or were charged with knowledge of such fact. Being insolvent all through its history of existence, there always existed the possibility that the stockholders or creditors of ICT Insurance might force the Board of Insurance Commissioners to place ICT Insurance in receivership although J. Byron Saunders and Garland A. Smith were paid and accepted bribes to aid and permit ICT Insurance Company to continue to operate. Therefore, to pull the control of the ICT Group out from under ICT Insurance, in the event of such certainty that ICT Insurance Company would eventually be placed in receivership because of its hopelessly insolvent condition, there began a systematic scheme and conspiracy to take away from ICT Insurance the control of the ICT Group and to bleed ICT Insurance of its assets and to place such assets out of the reach of the claimants, creditors, stockholders and policyholders of ICT Insurance and ICT Insurance Company's Receiver in the event of receivership, over into the ICT Corp. so that ICT Corp. and these officers and/or directors could have such assets for their own benefit and use, all in fraud of ICT Insurance and its claimants, creditors, stockholders and policyholders.

254.

The first step in such scheme was initiated and carried out in the same joint Board of Directors' meeting of ICT Insurance Company and Board of Directors' and Stockholders' Meeting of ICT Corp. on July 16, 1955 at Sugarland, Texas, in which the $977,632.52 forgiveness to JACCO [fol. 256] of Texas was granted by the Directors of ICT Insurance Company as hereinbefore alleged. At this time, the Directors of ICT Insurance Company and ICT Corp. were substantially the same. At such meeting, Ben Jack

Cage, John G. Vaughan, Nile E. Ball, Paul C. Sparks and William J. Harris, the committee that had theretofore been designated by the Board of Directors of ICT Insurance Company to vote all of the common voting stock of ICT Corporation owned by ICT Insurance Company, voted to increase the 3,500,000 shares of common no par value stock of ICT Corp. from 3,500,000 shares to 4,500,000 and to make all of such stock voting stock on an equal footing with the 10,000 shares of voting stock that ICT Insurance held, which up to that date, was all of the voting stock of ICT Corp. By a domestic amendment to ICT Corp. approved the 4th day of October 1955, such resolution was carried out by ICT Corp. and its officers and directors, which officers and/or directors as hereinbefore alleged were substantially the same persons who were officers and/or directors of ICT Insurance.

[fol. 257] 255.

Such illegal and wrongful acts of the persons hereinabove set forth composed of such committee in voting the stock of ICT Corp. for ICT Insurance Company in such resolution, as hereinabove alleged, and the wrongful and illegal acts of the Officers and Directors of ICT Insurance who ratified such actions of such directors constituted a breach of such directors' and officers' duty to ICT Insurance Company. That such scheme of converting the 4,500,000 shares of common non-voting shares of ICT Corp. into voting shares with equal rights to the 10,000 outstanding common voting shares took away from ICT Insurance the control of the entire ICT group. That such action of ICT Corp. and such interlocking officers and/or directors of ICT Corp. and ICT Insurance Company was in fraud of the rights of ICT Insurance and its claimants, creditors, stockholders and policyholders and was void. The Receiver herein sues to have declared null and void the Charter Amendment of ICT Corp. of October 4, 1955, wherein the 4,500,000 shares of non-voting stock were made voting stock on equal footing with the 10,000 shares of voting stock held by ICT Insurance. That furthermore, as will hereinafter be further alleged, such 10,000 shares of original common voting stock

of ICT Corp. that was held by ICT Insurance was wrongfully conveyed out of ICT Insurance to National Bankers Life and later transferred on to ICT Corp., which stock as will hereinafter be further pleaded, the Receiver seeks to recover. That furthermore, through the loss of control of the ICT group through such transaction, ICT Insurance was damaged in the approximate amount of $2,000,000.00 which loss the Receiver sues to recover from ICT Corp. and the officers and/or directors of ICT Insurance and ICT Corporation by reason of the illegal, wrongful and fraudulent acts as hereinabove alleged.

[fol. 258] 256.

To further the conspiracy, in 1955, a scheme was entered into as between Pierce P. Brooks, National Bankers Life Insurance Company, Nile E. Ball, Ben Jack Cage, ICT Corp., JACCO of Alabama, Lester F. Hall and Frank G. Newman, whereby ICT Insurance was caused to disburse $1,864,515.94 for the alleged purchase of 3,101 shares of stock of National Bankers Life Insurance Company from Pierce P. Brooks, Chairman of the Board of National Bankers Life Insurance Company, 1,724 shares of which stock ICT Insurance never received, and all of which stock at such time was worthless. In such transaction, ICT Insurance was caused to wrongfully and illegally convey away three of its assets; the ICT Building, the 80,000 shares of stock of A.R.A. Manufacturing Company which represented the entire common voting stock of such company, and the 10,000 shares of common voting stock of ICT Corp. which was all of the voting stock of ICT Corporation. This transaction occurred in the following manner:

257.

In December 1954, after a series of negotiations, Ben Jack Cage as President of Continental Union Life Insurance Company, entered into a transaction with John A. Farber, President of Service Life Insurance Company of Omaha, Nebraska, whereby the Service Life Insurance Company and Continental Union Life were caused to enter

into a Coinsurance and Reinsurance Agreement whereby as of December 21, 1954, the Service Life Insurance Company ceded to Continental Union Life on a coinsurance plan, 95 per cent of each and every policy of insurance in force in the Service Life Insurance Company as of that date excepting certain policies. Under the terms of the contract, approximately $9,000,000.00 in reserves that were required to be maintained on such policies of insurance in the form of cash, stocks, bonds and mortgage loans were transferred to or agreed to be transferred to Continental Union Life along with such policies and Continental Union [fol. 259] Life agreed to pay to Service Life Insurance Company $628,000.00 in commissions for such business. Since Continental Union Life did not have assets in the amount of $628,000.00 to pay to Service Life Insurance Company as a commission for such business after the receipt of $1,050,000.00 in cash, being a part of the approximately $9,000,000.00 reserves that Service Life Insurance Company was to transfer to Continental Union Life, Continental Union Life used $628,000.00 of such $1,050,000.00 cash transferred to it to pay the $628,000.00 commissions to Service Life Insurance Company.

258.

By virtue of such payment of the $628,000.00 by Continental Union Life to Service Life Insurance Company of such reserves transferred to Continental Union Life by Service Life Insurance Company to back up the insurance assumed by Continental Union Life, Continental Union Life did not have sufficient assets to back up the necessary reserves on such business assumed and other business carried by Continental Union Life to maintain a solvent financial condition.

259.

Some time in February 1955, at an exact date well known to the defendants, Ben Jack Cage met Pierce P. Brooks on an airplane en route from New Orleans to Dallas and began discussions concerning the sale of National Bankers Life Insurance Company to Ben Jack Cage. Subsequent nego-

tiations were had in San Diego, California, and Dallas, Texas, as between Pierce P. Brooks, Ben Jack Cage, Lester F. Hall and Frank G. Newman concerning such sale. Growing out of such negotiations in March 1955, a series of option agreements were entered into whereby Pierce P. Brooks agreed to sell to JACCO of Alabama and Ben Jack Cage approximately 10,000 shares of stock of National Bankers Life Insurance Company for a total consideration [fol. 260] of approximately $6,000,000.00 to be paid to Pierce P. Brooks for such stock. In connection with such agreement, a scheme was entered into as between the defendants whereby in order for Ben Jack Cage to obtain the cash for the payment to Brooks for such $6,000,000.00, National Bankers Life Insurance Company would be substituted for Continental Union Life Insurance Company in the Coinsurance and Reinsurance Treaties as between Continental Union Life and Service Life Insurance Company as hereinbefore alleged. This was to be done in order that the approximately $9,000,000.00 of cash and other liquid assets in the form of reserves would be transferred from Continental Union Life over to National Bankers Life Insurance Company so that the cash transferred and realized from the liquidation of such assets so transferred as well as other cash of National Bankers Life Insurance Company could be used by Pierce P. Brooks to purchase various assets of the ICT Group Companies so that Ben Jack Cage and these other defendants could then use such cash assets received by the ICT group companies to exercise the options of JACCO of Alabama and Ben Jack Cage by using such cash assets of such companies in purchasing such stock from Pierce P. Brooks in the name of and on behalf of JACCO of Alabama and Ben Jack Cage for their own use and benefit. Such options, as hereinafter will be alleged, were amended from time to time and before the first option was exercised, ICT Corp. entered into an agreement with JACCO of Alabama and Pierce P. Brooks, whereby JACCO of Alabama assigned and ICT Corp. agreed to assume and take over the rights, title and interest of JACCO of Alabama in and to the option agreements as between JACCO of Alabama and Pierce P. Brooks for

such purchase of approximately 10,000 shares of National Bankers Life Insurance Company stock at the price of approximately $6,000,000.00.

[fol. 261] 260.

In March 1955, at the time that the original option agreements were entered into as between JACCO of Alabama and Pierce P. Brooks for JACCO of Alabama to purchase such 10,000 shares of National Bankers Life Insurance Company stock for a consideration to Pierce P. Brooks of $6,000,000.00, and at the time that ICT Corp. assumed and took over such rights, titles, and interests of JACCO of Alabama to purchase such stock, National Bankers Life Insurance Company had the following capital stock authorized and outstanding, which stock and its classification and par value were issued on the following dates and in the following manner:

(1) 2,060 shares of common stock with a par value of $10.00 per share and 44 shares of preferred stock, series A, at the par value of $100.00 per share, were issued on the original incorporation of National Bankers Life Insurance Company in May 1945 for the payment into National Bankers Life Insurance Company, $25,000.00 for such stock.

(2) 383 shares of preferred stock, class B, at the par value of $100.00 per share, and 317 shares of preferred stock, class C, at the par value of $100.00 per share and an additional 500 shares of common stock at the par value of $10.00 per share were authorized and issued in connection with a Charter Amendment of National Bankers Life Insurance Company on the 26th day of July 1946.

(3) 500 shares of class D, preferred stock, at a par value of $100.00 per share were authorized and issued in connection with a Charter Amendment of National Bankers Life Insurance Company on the 17th day of May 1949.

(4) 500 shares of class E, preferred stock, at the par value of $100.00 per share were authorized and issued in connection with an Amendment to the Articles of Incorporation of National Bankers Life Insurance Company on [fol. 262] the 23rd day of March 1950.

(5) 5,000 shares of class F, preferred stock, at the par value of $10.00 per share, were authorized and issued upon the payment into National Bankers Life Insurance Company of $50,000.00 for such 5,000 shares of class F, preferred stock, in connection with a Charter Amendment of National Bankers Life Insurance Company on January 22, 1954.

(6) 5,000 shares of class G, preferred stock, of National Bankers Life Insurance Company at a par value of $10.00 per share were authorized and issued upon the payment of $50,000.00 into National Bankers Life Insurance Company in connection with a Charter Amendment of National Bankers Life Insurance Company on the 15th day of March 1954. That in connection with the Charter Amendments of January and March 1954 hereinabove set forth of National Bankers Life Insurance Company authorizing the issuance of the preferred stock, class F, in the amount of 5,000 shares at the par value of $10.00 per share and the authorization and issuance of the preferred stock, class G, in the amount of 5,000 shares at the par value of $10.00 per share, the $50,000.00 of money used in connection with each of such Charter Amendments was furnished by Pierce P. Brooks and Brooks had such 10,000 shares of stock issued to his friends, employees, and business associates. This 10,000 shares of series F and G stocks which were paid for on the basis of $10.00 per share on its original issue was the stock that Pierce P. Brooks agreed to sell to JACCO of Alabama, Ben Jack Cage and ICT Corp. for $5,000,000.00. In connection with such sale and such option agreements, Pierce P. Brooks agreed with JACCO of Alabama, Ben Jack Cage and ICT Corp. that he would cause a stockholders' meeting of National Bankers Life Insurance Company to be held on April 15, 1955, and at such meeting he would cause at least two-thirds of the stock of National Bankers Life Insurance Company and a majority of the [fol. 263] directors of National Bankers Life Insurance Company to vote in favor of a resolution amending the Articles of Incorporation of National Bankers Life Insurance Company, making all of such capital stock of National

Bankers Life Insurance Company, totalling 14,304 shares, common voting stock. In conformity with such agreement, Pierce P. Brooks did cause at least two-thirds of the stock of National Bankers Life Insurance Company and a majority of the directors of National Bankers Life Insurance Company to vote such resolution, and on the 21st day of April 1955, in conformity with such resolution, an amendment was obtained to the Charter of National Bankers Life Insurance Company, making all of the 14,304 shares common stock, each share equal in all respects to each other share, except that on 1,744 of such shares there was placed a par value of $100.00 per share, and upon the balance of the 12,560 shares, there was placed a par value of $10.00 per share. The $100.00 par value common stock was designated as "Class A Common Stock" and the $10.00 par value stock was designated as "Class B Common Stock." In such amendment, the 44 shares of class A preferred stock, 383 shares class B preferred stock, 317 shares class C preferred stock, 500 shares of class D preferred stock, and 500 shares of class E preferred stock, totalling 1,744 shares, were made the class A common stock with a par value of $100.00. In such amendment, the 5,000 shares of class F preferred stock and 5,000 shares of class G preferred stock and the common stock in the amount of 2,560 shares, all totalling 12,560 shares, were made the "Class B Common Stock" with a par value of $10.00 per share.

261.

At the time that such option agreements were entered into, Pierce P. Brooks owned a small amount of the 10,000 shares of F and G stock, which was changed to class B common in April 1955 Charter Amendment, for which he had paid only $10.00 per share; that in order to fulfill the [fol. 264] option agreements to deliver the full 10,000 shares of F and G stock Pierce P. Brooks purchased from his friends, employees and business associates the rest of the series F and G stock (Class B Common) and a majority thereof at $10.00 per share on or about or subsequent to the execution of such option agreements.

262.

On May 5, 1955, the first option agreement as between JACCO of Alabama, ICT Corp. and Pierce P. Brooks was exercised whereby 1,000 shares of preferred stock of National Bankers, series F stock (Class B Common) at $1,000.00 per share for a total consideration of $1,000,000.00 was allegedly purchased by JACCO of Alabama, Ben Jack Cage and ICT Corp. from Pierce P. Brooks in the following manner: On May 5, 1955, National Bankers Life Insurance Company paid to ICT Corp. $628,000.00, which was the consideration due Continental Union Life on the assumption agreement between Continental Union Life, National Bankers Life Insurance Company and Service Life Insurance Company represented by commissions which Continental Union Life had disbursed to Service Life Insurance Company in December 1954 under the original reinsurance contract between Continental Union Life and Service Life Insurance Company as hereinbefore alleged. ICT Corp. accepted this $628,000.00 cash on behalf of Continental Union Life. On the same date, National Bankers Life Insurance Company paid to ICT Corp. $382,130.00 for the purchase of West Buechel Bonds from ICT Corp. These two checks of May 5, 1955 from National Bankers Life Insurance Company to ICT Corp. totalled $1,010,130.00. On the same date, May 5, 1955, ICT Corp. used this money received from National Bankers Life Insurance Company in the issuance of its check on such date to Pierce P. Brooks in the amount of $999,000.00. This $999,000.00 and a $1,000.00 check that Ben Jack Cage had caused Continental Union Life to disburse to Pierce P. Brooks on March 2, [fol. 265] 1955 as earnest money on the first option, made up the $1,000,000.00 paid to Pierce P. Brooks for the 1,000 shares of preferred stock, series F, (Class B Common) purchased by JACCO of Alabama and ICT Corp. On September 15, 1955 National Bankers Life Insurance Company stock certificate 2B for 1,000 shares was issued to Ben Jack Cage. All of this stock had been purchased by Pierce P. Brooks for $10.00 per share. In connection with the execution of such three option agreements, it was agreed as between JACCO of Alabama, Ben Jack Cage, ICT Corp. and Pierce P. Brooks that of such 10,000 shares of National

Bankers Life Insurance Company to be purchased under such agreements; that at all times all of such 10,000 shares of series F and G stock (Class B Common) to be purchased or at least an amount thereof equalling 51 per cent of the total outstanding stock of National Bankers Life Insurance Company would be pledged to Pierce P. Brooks and held by the South Main State Bank, Houston, Texas, as security to Pierce P. Brooks of the performance of the obligations of Ben Jack Cage, JACCO of Alabama and ICT Corp. under the option and purchase agreements. In conformance with such agreement on May 5, 1955 the 1,000 shares of Class B stock, represented by National Bankers Life Insurance Company stock certificate 2 B, (formerly the class F preferred stock), was deposited with the South Main State Bank under such pledge agreement.

263.

On the 3rd day of June 1955, the second option agreement was revised and carried out through a contract of sale that was entered into as of the same date of June 3, 1955, by Pierce P. Brooks and JACCO of Alabama, whereby it was agreed that Pierce P. Brooks would deliver to JACCO of Alabama and JACCO of Alabama agreed to purchase 1,489 shares of the class B common stock of National Bankers Life Insurance Company (formerly the class F preferred stock until Charter Amendment of April 21, 1955), at a consideration to be paid by Cage to Brooks in the amount of $1,400,000.00. Such sale was to be concluded [fol. 266] upon the same day of the sale of the ICT Building from ICT Insurance Company to National Bankers Life Insurance Company under the terms of a contract of sale that ICT Insurance had been caused to enter into with National Bankers Life Insurance Company, dated June 2, 1955. The purchase price of $1,400,000.00 to be paid to Brooks by Cage was to be paid in the following manner: Cage to pay Brooks $500,000.00 in cash and to execute and deliver to Brooks a promissory note in the amount of $900,000.00, payable in three installments: the first installment payable September 8, 1955, in the amount of $500,000.00, the second installment payable October 15, 1955

in the amount of $200,000.00, and the third and last installment payable November 15, 1955, in the amount of $200,000.00. It was further agreed in such contract of sale that the note was to be secured by the pledge agreement executed by Ben Jack Cage in favor of Pierce P. Brooks, dated May 5, 1955, in which the South Main State Bank, Houston, Texas, was named as pledgeholder. Such agreement was carried out on June 20, 1955, in the following manner: ICT Insurance Company was caused to sell the ICT Building in Dallas, Texas, to National Bankers Life Insurance Company at a total consideration of $2,724,916.00. This consideration was paid by National Bankers Life Insurance Company executing its check to ICT Insurance on the same date in the amount of $997,925.37 and the balance by National Bankers Life Insurance Company executing its note to ICT Insurance Company in the amount of $504,267.00, payable in October and November of 1955, and by National Bankers Life Insurance Company's assumption of the balance of the outstanding liens on the building and assumption of the liabilities of the ICT Building. On the same date of June 20, 1955, ICT Insurance Company, out of the $997,925.37 received from National Bankers Life Insurance Company, was caused to execute its check to Pierce P. Brooks in the amount of $500,000.00, which payment by ICT Insurance Company to Brooks represented the $500,000.00 down payment under such contract of sale of June 3, 1955, hereinabove set forth. On June 17, 1955, [fol. 267] JACCO of Alabama executed its note in the amount of $900,000.00, payable to Pierce P. Brooks, which note was payable $500,000.00 on September 8, 1955; $200,000.00 on October 15, 1955 and $200,000.00 payable on November 15, 1955, which promissory note of $900,000.00, together with the $500,000.00 paid by ICT Insurance Company to Pierce P. Brooks made up the total consideration of $1,400,000.00 to Brooks for the 1,480 shares of common B stock (formerly preferred stock, series F), under the contract of sale of June 3, 1955. On June 20, 1955 National Bankers Life stock certificate 10 B for 1,480 shares was issued in the name of Ben Jack Cage and deposited in the South Main State Bank, Houston, Texas, under the pledge agreement from JACCO of Alabama and ICT Corp.

to Pierce P. Brooks to secure the balance of the purchase price for such stock from ICT Corp. and JACCO of Alabama to Pierce P. Brooks.

264.

The following payments were made on the $900,000.00 note of JACCO of Alabama to Pierce P. Brooks in the following manner:

(1) The first installment of $500,000.00 due on September 8, 1955, was paid in the following manner: National Bankers Life Insurance Company issued its check to ICT Life in the amount of $200,000.00, which $200,000.00 was a payment by National Bankers Life Insurance Company to ICT Life in the form of commissions that National Bankers Life Insurance Company paid to ICT Life for reinsurance that ICT Life had ceded to National Bankers Life Insurance Company under a reinsurance agreement dated May 1, 1955. On the same date of September 8, 1955, that ICT Life received such $200,000.00 from National Bankers Life Insurance Company, ICT Life executed its check in the amount of $200,000.00 to Pierce P. Brooks as a payment to Brooks as a part of such $500,000.00 payment due September 8, 1955. On the same date of September 8, 1955, Na-[fol. 268] tional Bankers Life Insurance Company issued its check in the amount of $200,000.00 to Continental Union Life. Such $200,000.00 was a payment by National Bankers Life Insurance Company as commissions to Continental Union Life for reinsurance that National Bankers Life Insurance Company had assumed from Continental Union Life under a reinsurance treaty executed between such companies May 1, 1955. On the same date of September 8, 1955, Continental Union Life executed its $200,000.00 check to Pierce P. Brooks, which $200,000.00 was in part payment of the $500,000.00 payment due September 8, 1955, on the $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks. On the same date of September 8, 1955, National Bankers Life Insurance Company executed its check in the amount of $100,000.00 to Continental Union in exchange for Continental Union's transfer to National

Bankers Life Insurance Company $100,000.00 of Lone Star Boat Manufacturing Company's Debenture Bonds. On the same date of September 8, 1955, Continental Union executed its check in the amount of $100,000.00 to Pierce P. Brooks, which was in part payment of the $500,000.00 payment due September 8, 1955, under the $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks. Therefore, these checks of ICT Life in the amount of $200,000.00, Continental Union Life in the amount of $200,000.00, and Contin[illegible]tal Union in the amount of $100,000.00 paid to Pierce P. Brooks on such date of September 8, 1955, totalled $500,000.00 and was in payment of the $500,000.00 September 8, 1955 installment on the $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks on June 3, 1955, in connection with the execution of the second option between JACCO of Alabama, ICT Corp. and Pierce P. Brooks.

(2) The second installment due, in the amount of $200,000.00 under such $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks on June 17, 1955, was paid to Pierce P. Brooks in the following manner: On October 6, 1955, ICT Insurance Company was caused to execute its [fol. 269] check to ICT Corp. in the amount of $200,000.00, for the purchase of $200,000.00 worth of ICT Corporation's stock. On the same date of October 6, 1955, ICT Corp. took this same $200,000.00 and issued its check to Pierce P. Brooks in the amount of $200,000.00 in payment of the $200,000.00 installment due on October 15, 1955, under such $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks on June 17, 1955.

(3) The third and last installment of such $900,000.00 note, being in the amount of $200,000.00, was paid by cancellation in connection with a transaction as between ICT Corp. and Pierce P. Brooks in August 1956, as will hereinafter be more fully alleged.

265.

On or about September 21, 1955, a contract of sale was entered into as between Pierce P. Brooks and JACCO of

Alabama and ICT Corp., which contract of sale was an amendment of the third option agreement of March 9, 1955, in which contract of sale it was agreed that Brooks would sell to Cage and ICT Corp. 7,438 shares of the common B stock of National Bankers Life Insurance Company (formerly preferred stock, series F and G of National Bankers prior to April 21, 1955 Charter Amendment) at a consideration to be paid by JACCO of Alabama and ICT Corp. to Pierce P. Brooks in the amount of $3,598,000.00 for such stock. Such total consideration of $3,598,000.00 was to be paid to Pierce P. Brooks in the following manner: $999,000.00 in cash and two promissory notes payable to Brooks, to-wit: 1 collateral promissory note, dated September 22, 1955, in the amount of $1,000,000.00, said note to become due and payable in full on the 4th day of October 1955, secured by a pledge of 4,976 shares of the 7,438 shares of National Bankers Life Insurance Company that was being purchased in such contract; a promissory note in the amount of $1,599,000.00 to be executed to Pierce P. Brooks by JACCO of Alabama, payable in monthly install- [fol. 270] ments of $50,000.00 each, with the first of said installments becoming due and payable on the 10th day of January 1956, with a like monthly installment being due and payable on the 10th day of each succeeding calendar month thereafter until the said note was fully and completely paid. It was further agreed in such contract of sale that the $1,599,000.00 note was secured by the pledge agreement executed by Cage in favor of Brooks dated May 5, 1955. It was further agreed that the 4,976 shares of the capital stock of National Bankers Life Insurance Company that were to be pledged under the collateral note in the amount of $1,000,000.00 would upon the payment of said note be then forthwith forwarded to the South Main State Bank for a deposit with the Bank under such pledge agreement.

266.

The $999,000.00 cash payment on such agreement of September 21, 1955 was paid to Pierce P. Brooks in the following manner: On September 21, 1955, National Bankers Life Insurance Company issued its check to ICT Corp.

the amount of $200,000.00 in exchange for ICT Insurance
mpany stock. On the same date of September 21, 1955,
tional Bankers Life Insurance Company issued its check
ICT Corp. in the amount of $123,000.00, in exchange for
T Corp. stock. On August 10, 1955, ICT Corp. had sold
Gulf Union Insurance Company, National Bankers Life
surance Company stock for $200,000.00. On the same date
September 21, 1955, ICT Corp., out of this money re-
ved, issued its check to Pierce P. Brooks in the amount
$522,484.06, which was in part payment of such cash
wn payment to Brooks in the amount of $999,000.00. On
same date of September 21, 1955, National Bankers Life
surance Company executed its check to Continental Union
the amount of $112,000.00 in exchange for $112,000.00
Lone Star Boat Manufacturing Company's Debenture
nds. On the same date of September 21, 1955, Conti-
ntal Union issued its check to Pierce P. Brooks in the
ol. 271] amount of $112,000.00, which was in part pay
nt of such $999,000.00 down payment on the September
1955 contract of sale. On the same date of September
1955, National Bankers Life Insurance Company issued
check to ICT Insurance Company in the amount of
564,515.94 in exchange for 80,000 shares of A.R.A. Manu-
turing Company stock, 108,147 shares of ICT Corp.
ck, 10,000 shares of which stock being all of the com-
n voting stock of ICT Corp., 58,000 shares of the stock
Texas Continental Life Insurance Company, City of
est Buechel Bonds in the amount of $35,640.00 and Chap-
n College Mortgages in the amount of $66,000.00. On
same date of September 21, 1955, ICT Insurance Com-
ny was caused to issue its check in the amount of
64,515.94 to Pierce P. Brooks, which was in part payment
such down payment of $999,000.00 on such September
1955 contract of sale. These checks of September 21,
55 executed to Pierce P. Brooks by ICT Corp. in the
ount of $522,484.06, of Continental Union of $112,000.00,
ICT Insurance Company in the amount of $364,515.94,
de up the $999,000.00 down payment to Brooks on Sep-
nber 22, 1955 contract to sell the 7,438 shares of National
nkers Life Insurance Company stock to JACCO of Ala-
ma and ICT Corp.

267.

On the same date of September 21, 1955, JACCO of Alabama executed its note to Pierce P. Brooks in the amount of $1,000,000.00, which note was guaranteed by ICT Corp. and put up as collateral 4,976 of the 7,438 shares which was being allegedly sold by Brooks in the September 21, 1955 transaction. On the same date, JACCO of Alabama executed its note in the amount of $1,599,000.00 to Pierce P. Brooks as agreed in such contract of sale of September 21, 1955. Therefore, the $999,000.00 cash payments heretofore alleged, the execution of the $1,000,000.00 note and the $1,599,000.00 note made up the total consideration of $3,598,000.00 that was to be paid to Pierce P. Brooks [fol. 272] for the 7,438 shares of common B stock of National Bankers Life Insurance (formerly preferred stock series F and G prior to the April 21, 1955 Charter Amendment of National Bankers) which 7,438 shares Pierce P. Brooks had just purchased from his employees, friends and business associates for $10.00 a share, or a total consideration of approximately $74,380.00. As hereinbefore alleged, 4,976 of such shares were collateralized under the $1,000,000.00 note executed by JACCO of Alabama and guaranteed by ICT Corp., and under the terms of such agreement, all of such 7,438 shares were subject to the pledge agreement.

268.

As hereinbefore alleged, the $1,000,000.00 note executed by JACCO of Alabama and guaranteed by ICT Corp. was due and payable on October 4, 1955. Such note of ICT Corp. and JACCO of Alabama of $1,000,000.00 payable to Pierce P. Brooks was paid to Pierce P. Brooks on October 4, 1955 by ICT Insurance Company executing two checks, each in the amount of $500,000.00, payable to Pierce P. Brooks. This $1,000,000.00 disbursed by ICT Insurance Company on October 4, 1955, to Pierce P. Brooks, was a part of the $1,564,515.94 that ICT Insurance had received on September 21, 1955 from National Bankers Life Insurance Company in exchange for the securities transferred

to National Bankers Life Insurance Company by ICT Insurance Company on such date as hereinabove alleged.

269.

The $1,599,000.00 note that was executed on September 21, 1955, was paid by cancellation in connection with a transaction as between ICT Corp. and Pierce P. Brooks in August 1956 as will hereinafter be more fully pleaded.

[fol. 273] 270.

In connection with the contract of sale of September 21, 1955 in which Brooks sold to Cage and ICT Corp. 7,438 shares of class F and G stock at the total consideration in the amount of $3,598,000.00, as hereinbefore alleged on September 22, 1955, certificate 23B in the amount of 4,976 shares and certificate 22B of National Bankers Life Insurance Company were issued to JACCO of Alabama in the amount of 2,462 shares, which certificates made up the total of 7,438 shares sold by Brooks to ICT Corp. and Cage. On September 26, 1955, certificate 22B in the amount of 2,462 shares was broken down into a number of certificates representing such total number of shares and out of such shares, certificate 25B in the amount of 300 shares and certificate 26B in the amount of 1,077 shares were delivered to ICT Insurance. ICT Insurance Company was caused to show on its books that it received this total of 1,377 shares in return for the issuance of its check of $500,000.00 to Pierce P. Brooks on June 20, 1955 and $364,515.95 to Pierce P. Brooks on September 21, 1955.

271.

In connection with the two $500,000.00 checks that ICT Insurance Company was caused to issue to Pierce P. Brooks on October 4, 1955, ICT Insurance Company was supposedly given stock of National Bankers Life Insurance Company; however, no stock of National Bankers Life Insurance Company representing such $1,000,000.00 paid out by ICT Insurance was ever issued in ICT Insurance Company's name

until January 14, 1956, at which time, two certificates, being certificates 55B and 56B, each in the amount of 862 shares were issued in ICT Insurance Company's name; however, these two certificates came out of certificates 23B, 10B and 2B, which certificates 23B, 10B and 2B, when issued to Ben Jack Cage in May, June and September of 1955, were immediately placed on pledge to Pierce P. Brooks in the South Main State Bank in Houston, Texas, as herein- [fol. 274] above alleged, and which certificates, and all subsequent certificates issued out of such certificates including certificates 54B and 55B which were allegedly issued to ICT Insurance Company on January 14, 1956, continued to remain on pledge in the South Main State Bank, Houston, Texas, as security on the indebtedness of JACCO of Alabama and ICT Corp. to Pierce P. Brooks as hereinbefore alleged.

272.

On September 22, 1955, another option agreement was entered into as between Pierce P. Brooks and JACCO of Alabama whereby JACCO of Alabama was given an option to purchase 89 shares of the capital stock of National Bankers Life Insurance Company at a price of $1.00 per share, payable upon the exercise of such option. This option was to be exercised by JACCO of Alabama upon the payment of the last installment of $200,000.00 on the $900,000.00 note executed by JACCO of Alabama to Pierce P. Brooks on June 17, 1955. It was likewise agreed that upon exercise of this option the stock would be pledged to Pierce P. Brooks under the pledge agreement as hereinabove set out. Since this last and final payment was never paid, such option was never exercised and carried out. These four agreements as hereinbefore alleged, represented an agreement by Ben Jack Cage and ICT Corp. to purchase a total of 10,007 shares of stock of National Bankers Life Insurance Company for approximately $6,000,000.00.

273.

As hereinbefore alleged, in connection with the second and third contracts as between Pierce P. Brooks on the one

hand, and JACCO of Alabama and ICT Corp. on the other, ICT Insurance was caused to disburse on June 20, 1955, $500,000.00 to Pierce P. Brooks; on October 6, 1955, ICT Insurance through ICT Corp. was caused to disburse $200,000.00 to Pierce P. Brooks; on September 21, 1955, ICT Insurance was caused to disburse $364,515.94 to Pierce P. [fol. 275] Brooks, and on October 4, 1955, ICT Insurance was caused to disburse two checks, each in the amount of $500,000.00 to Pierce P. Brooks. Under the management contract as between JACCO of Texas and ICT Insurance, JACCO of Texas had no right to invest any funds of ICT Insurance Company, all of such rights being expressly reserved to ICT Insurance in such management contract. Furthermore, neither the Articles of Incorporation, nor the constitution and by-laws of ICT Insurance Company gave Ben Jack Cage the right to invest such funds of ICT Insurance Company in the manner hereinabove alleged; that furthermore, neither the minutes of ICT Insurance Company, neither the minutes of the board of directors of ICT Insurance Company, nor the minutes of the investment committee of ICT Insurance Company gave any right to Ben Jack Cage or any of the other officers or directors of ICT Insurance to allegedly invest ICT Insurance Company's monies in the manner hereinabove alleged. As a result of the illegal, wrongful and fraudulent acts of Ben Jack Cage, Pierce P. Brooks, Lester F. Hall, JACCO of Alabama, ICT Corp., Frank G. Newman, National Bankers Life Insurance Company and Nile E. Ball, hereinabove alleged, ICT Insurance Company was caused to expend $2,064,515.94 of its cash assets in the performance of contracts as between JACCO of Alabama and ICT Corp. on the one hand, and Pierce P. Brooks on the other, to which contracts ICT Insurance Company was not a party to, had no rights under, was not the beneficiary of and had no liabilities under. All of such acts constituted a conversion and misappropriation of cash assets of ICT Insurance in such amounts of $2,064,515.94 for which amount the Receiver herein sues to recover from such defendants. That in the alternative, through the illegal and fraudulent acts of the

defendants just above-named, ICT Insurance was caused to expend $1,864,515.94 cash assets to purportedly purchase 3,101 shares of common B stock of National Bankers Life Insurance Company (formerly preferred stock, class F and [fol. 276] G of National Bankers Life Insurance Company prior to April 21, 1955 Charter Amendment), which stock Pierce P. Brooks had in connection with such alleged sales transactions hereinabove alleged paid only $10.00 per share and of which stock only 1,377 shares were delivered to ICT Insurance, the balance of which in the amount of 1,724 shares was never delivered to ICT Insurance, could not be delivered to ICT Insurance by reason of the fac that such 1,724 shares of stock as hereinbefore alleged were pledged by ICT Corp. and JACCO of Alabama to Pierce P. Brooks and held in the South Main State Bank of Houston, Texas, as security for an indebtedness owed by JACCO of Alabama and ICT Corp. to Pierce P. Brooks. That furthermore, at such time the 1,377 shares of National Bankers Life Insurance Company were issued to ICT Insurance Company such shares were worthless. All of such acts of such defendants constituted a conversion and misappropriation of assets of ICT Insurance in such amount of $1,864,515.94 for which amount the Receiver sues to recover from such defendants.

274.

In its annual statement as of December 31, 1955, ICT Insurance was caused to carry the 1,377 shares that were purportedly issued to ICT Insurance on September 26, 1955 and the 1,724 shares that were not issued to ICT Insurance until January 14, 1956 and which 1,724 shares were at all times on pledge to Pierce P. Brooks for the indebtedness of JACCO of Alabama and ICT Corp. in the South Main State Bank, Houston, Texas. Such total 3,101 shares of National Bankers Life Insurance Company, 1,724 shares of which were on pledge, were carried in ICT Insurance Company's annual statement as of December 31, 1955, at the value of $1,864,515.94. At the time that such 3,101 shares were carried in ICT Insurance Com-

pany's statement at such value, Ben Jack Cage, Frank G. Newman, Pierce P. Brooks, Lester F. Hall, Nile E. Ball, [fol. 277] JACCO of Alabama, ICT Corp. and James G. Cage knew that the 1,724 shares of National Bankers Life Insurance Company stock had not been transferred to ICT Insurance as of December 31, 1955 and furthermore, knew, that such shares of stock were on pledge to Pierce P. Brooks in the South Main State Bank in Houston, Texas, to secure to Pierce P. Brooks the indebtedness owed to Pierce P. Brooks by ICT Corp. and JACCO of Alabama. Furthermore, these defendants knew that the shares of National Bankers Life Insurance Company were worthless as of December 31, 1955, the date such stock was carried in ICT Insurance Company's annual statement. That by such dishonest and fraudulent acts of carrying such encumbered and worthless stock of National Bankers Life Insurance Company stock in ICT Insurance Company's statement at the value of $1,864,515.94, the defendants Ben Jack Cage, James G. Cage and Nile E. Ball, as officers and/or directors of ICT Insurance Company breached their fiduciary duty to ICT Insurance and by reason of their aiding and abetting such officers and directors in the transactions hereinbefore alleged, the defendants, Pierce P. Brooks, ICT Corp., Frank G. Newman, Nile E. Ball, Lester F. Hall, JACCO of Alabama and National Bankers Life Insurance Company, joined, aided and abetted such officers and/or directors in the breach of their fiduciary duty to ICT Insurance and by such transactions all these defendants aided, abetted and furthered the conspiracy in falsifying ICT Insurance Company's annual statement as of December 31, 1955 in such amount of $1,864,515.94 in order to keep ICT Insurance operating in violation of law.

275.

As hereinbefore shown through such three option contracts and/or contracts of purchase, ICT Corp. and JACCO of Alabama were purchasing from Pierce P. Brooks 10,007 shares of the 14,304 shares outstanding of National Bankers [fol. 278] Life Insurance Company or approximately 70

per cent of the outstanding shares of stock of National Bankers Life Insurance Company, which upon the fulfillment of such agreements would have represented the purchase of the control of National Bankers Life Insurance Company by ICT Corp. and JACCO of Alabama. As hereinbefore alleged, ICT Insurance was caused to allegedly purchase 3,101 shares of National Bankers Life Insurance Company. Continental Union, ICT Life and Continental Union Life were likewise caused to purchase certain of such 10,007 shares of stock of National Bankers Life Insurance Company with ICT Corp. retaining a majority or 5,482 shares of such stock. Upon the consummation of such transaction, the ICT Group companies would have owned the controlling interest of National Bankers Life Insurance Company through such joint ownership of the majority of such 10,007 shares.

276.

However, ICT Corp. and JACCO of Alabama were unable to meet the last installment of the $200,000.00 due November 15, 1955, under the $900,000.00 note executed June 17, 1955 in connection with the second contract of sale; and furthermore, ICT Corp. and JACCO of Alabama were unable to meet the $50,000.00 payments per month, commencing January 10, 1956, due under the $1,599,000.00 note executed by JACCO of Alabama and ICT Corp. on September 22, 1955 in connection with the third contract of sale. In August 1956, a scheme was entered into as between Nile E. Ball, J. A. McFaddin and ICT Corp. on the one hand and Pierce P. Brooks on the other, whereby through such scheme ICT Corp. would be relieved of its indebtedness of $1,799,000.00 and would receive and gain control of A.R.A. Manufacturing Company and would receive other assets from Pierce P. Brooks in consideration for transferring back to Pierce P. Brooks 5,482 shares of National Bankers Life Insurance Company then held by [fol. 279] ICT Corp. Through such scheme, ICT Corp. would be made whole and would gain control of A.R.A. Manufacturing Company. This transaction was carried out

on August 28, 1956, in the following manner: ICT Corp. transferred to Pierce P. Brooks and the Presidential Life Insurance Company and the Guarantee Mortgage and Investment Company, two corporations controlled by Pierce P. Brooks, the 5,482 shares of National Bankers Life Insurance Company stock that ICT Corp. obtained from Pierce P. Brooks in the transactions hereinabove alleged, and as consideration to ICT Corp. for such transfer of such shares of National Bankers Life Insurance Company stock, ICT Corp. on such date received the following:

(1) Pierce P. Brooks, through Presidential Life Insurance Company and Guarantee Mortgage Investment Company, two corporations controlled by him, caused National Bankers Life Insurance Company to transfer to ICT Corp. the 80,000 shares of the common stock of A.R.A. Manufacturing Company which was the total outstanding common stock of A.R.A. Manufacturing Company and which was the same stock that ICT Insurance Company was fraudulently caused to transfer to National Bankers Life Insurance Company on September 21, 1955, in connection with the third contract of sale as between Pierce P. Brooks, ICT Corp. and JACCO of Alabama.

(2) 73,359 shares of ICT Corporation's common stock, which included the 10,000 shares of ICT Corp. common stock that ICT Insurance was fraudulently caused to transfer to National Bankers Life Insurance Company on September 22, 1955, in connection with the third contract of sale as between Pierce P. Brooks, ICT Corp. and JACCO of Alabama, which 10,000 shares of stock of ICT Corp. on September 21, 1955 at such date of transfer, represented all of the outstanding common voting stock of ICT Corp.

[fol. 280] (3) 30,000 shares of the common stock of ICT Insurance Company.

(4) As additional consideration to ICT Corp. for such transfer of the 5,482 shares of National Bankers Life Insurance Company stock to Pierce P. Brooks, Presidential Life Insurance Company and Guarantee Mortgage Investment Company, Pierce P. Brooks cancelled and forgave

ICT Corp. the $1,799,000.00 indebtedness due Pierce P. Brooks by ICT Corp., which represented the $200,000.00 final installment on the June 17, 1955 note executed in connection with the second contract of sale and the $1,599,000.00 note executed by JACCO of Alabama and guaranteed by ICT Corp. on September 21, 1955 in connection with the third contract of sale.

277

Such transaction as between ICT Corp. and Pierce P. Brooks eliminated the possibility of the ICT group ever obtaining the controlling stock of National Bankers Life Insurance Company. Furthermore, such transaction left ICT Insurance Company holding only a small minority of the stock of National Bankers Life Insurance Company, 1,724 shares of which were at all times on pledge in the South Main State Bank in Houston, Texas, to Pierce P. Brooks and were not issued in the name of ICT Insurance until January 14, 1956 and only then under an agreement whereby on January 14, 1956, ICT Insurance Company was wrongfully caused to agree that such 1,724 shares of stock of National Bankers Life Insurance Company were subject to the indebtedness and to all terms and condition of the $1,799,000.00 indebtedness from ICT Corp. to Pierce P. Brooks. On the 31st day of October 1956, ICT Insurance Company still held 2,418 shares of National Bankers Life Insurance Company, 1,724 shares of which were still on pledge to Pierce P. Brooks, and ICT Life held 351 shares of National Bankers Life Insurance Company stock. On or about such date, James G. Cage, as president of ICT [fol. 281] Insurance wrongfully caused ICT Insurance to enter into a transaction with Pierce P. Brooks whereby the 2,418 shares of National Bankers Life Insurance Company held by ICT Insurance along with the 351 shares held by ICT Life were transferred back to Pierce P. Brooks for a total consideration of $800,000.00, of which amount of $800,000.00 ICT Insurance received $706,834.77. That in connection with such transaction in such agreements of October 31, 1956, it was stated that ICT Insurance was obligated to Pierce P. Brooks under the $1,599,000.00 note

of September 22, 1955 and the $200,000.00 installment due under the $900,000.00 note of June 17, 1955 and as additional consideration to ICT Insurance, Pierce P. Brooks allegedly released ICT Insurance from the payment of such indebtedness. However, in truth and in fact, ICT Insurance Company at no time ever endorsed, guaranteed or assumed all or any part of such indebtedness, which indebtedness at all times was indebtedness of JACCO of Alabama and ICT Corporation, or in the alternative, if ICT Insurance did or was caused to assume such indebtedness under such obligations of ICT Corp. and JACCO of Alabama to Pierce P. Brooks such act would be ultra vires, beyond ICT Insurance Company's corporate powers to secure the indebtedness of another corporate entity and such would therefore have been null and void.

278.

That by reason of the transactions hereinabove alleged, ICT Insurance was caused to lose $3,000,000.00 in the transaction involving the National Bankers Life Insurance Company stock as between Pierce P. Brooks on the one hand and ICT Corp. and JACCO of Alabama on the other, which loss to ICT Insurance of such amount of approximately $3,000,000.00, representing cash and the 80,000 shares of stock of A.R.A. Manufacturing Company, which represented the entire common voting stock of A.R.A. Manufacturing Company, and the 10,000 shares of the [fol. 282] common voting stock of ICT Corp., which on September 21, 1955 at the time that ICT Insurance was wrongfully caused to convey away such 10,000 shares of ICT Corp. common voting stock, represented all of the common voting stock of ICT Corp., for which cash and/or securities the Receiver herein sues Pierce P. Brooks, ICT Corp., National Bankers Life Insurance Company, JACCO of Alabama, Lester F. Hall, James G. Cage, J. A. McFaddin, Ben Jack Cage and Nile E. Ball for the recovery of.

279.

On May 10, 1955, Pierce P. Brooks executed and delivered to the Mercantile National Bank at Dallas, Texas, a

Declaration of Trust, creating a trust with Pierce P. Brooks as grantor and the Mercantile National Bank as corporate trustee with Pierce P. Brooks as managing trustee and with Pierce P. Brooks as the sole beneficiary under such trust. As hereinbefore alleged, ICT Insurance on June 20, 1955, was caused to execute to Pierce P. Brooks its check no. A-6917 in the amount of $500,000.00 which check of ICT Insurance was on June 23, 1955, deposited in such trust by Pierce P. Brooks. The plaintiff alleges upon information and belief that the other monies that ICT Insurance was caused to pay to Pierce P. Brooks in 1955 in connection with the transactions as between Pierce P. Brooks, JACCO of Alabama, ICT Corp. and ICT Insurance Company involving the sale of National Bankers Life Insurance Company stock was deposited in such trust account. That furthermore, certain of such monies received from ICT Insurance were deposited in Pierce P. Brooks' personal bank account at the Mercantile National Bank at Dallas, Texas. That furthermore, on or about the 4th day of October 1956, approximately $700,000.00 of the funds in such trust account of Pierce P. Brooks and/or his personal bank account, were transferred over to a trust in the Mercantile National Bank at Dallas, Texas, in which trust Pierce P. Brooks is the grantor, Mercantile National Bank [fol. 283] is trustee, and Pierce P. Brooks, Martha B. Brooks and Robert P. Brooks are the beneficiaries. Upon information and belief, the plaintiff alleges that there is now on deposit in such two trusts and personal bank account of Pierce P. Brooks, cash and securities in excess of $1,000,000.00, which sum represents the monies received from ICT Insurance by Pierce P. Brooks, which monies ICT Insurance Company was illegally, wrongfully and fraudulently caused by Ben Jack Cage, Pierce P. Brooks, Nile E. Ball, ICT Corp. and JACCO of Alabama to pay over to Pierce P. Brooks, and the Receiver claims same for the benefit of ICT Insurance and its claimants, creditors, policyholders and stockholders and such funds should be impressed with a constructive trust for the benefit and protection of the plaintiff's rights, and the Mercantile National Bank at Dallas. The Receiver hereby notifies

all of said defendants that he is claiming an interest in said funds above-mentioned, and that said defendants should hold same intact in status quo until the rights of all parties are determined and adjudicated herein and said parties will pay out and disburse said funds at their peril. That furthermore, the Receiver herein sues for a temporary injunction to enjoin such defendants from disposing of such funds prior to final adjudication herein.

280.

That furthermore, as hereinbefore alleged, by reason of the dishonest and fraudulent acts of ICT Corp., Ben Jack Cage, Pierce P. Brooks, Nile E. Ball, J. A. McFaddin, National Bankers Life Insurance Company, JACCO of Alabama, ICT Insurance Company was fraudulently caused to convey away the 80,000 shares of common voting stock of A.R.A. Manufacturing Company, which stock through fraud of these defendants was not returned to ICT Insurance Company but was fraudulently conveyed to and placed in ICT Corporation, and ICT Insurance was further [fol. 284] fraudulently caused to convey away the 10,000 shares of the common voting stock of ICT Corp., which stock, through fraud of these defendants, was not returned to ICT Insurance but was fraudulently conveyed to and placed in ICT Corp. That such A.R.A. Manufacturing Company stock and ICT Discount Corporation stock was illegally, wrongfully and fraudulently taken away from ICT Insurance and its claimants, creditors, stockholders and policyholders by such defendants as hereinabove alleged, and the Receiver claims the same on behalf of ICT Insurance and its claimants, creditors, stockholders and policyholders and such stock of A.R.A. Manufacturing Company and ICT Corp. which is now in the hands of ICT Corp. should be impressed with a constructive trust for the benefit and protection of the Receiver and such parties. The Receiver hereby notifies defendant ICT Corp. that the Receiver is claiming title to such stock and that the defendant ICT Corp. should hold same intact in status quo until the rights of all parties are determined and adjudicated herein and said defendant ICT Corp. will dispose

of such stock at its peril. That furthermore, the Receiver herein sues for a temporary injunction to enjoin such defendants from disposing of such stock of A.R.A. Manufacturing Company and ICT Corp. prior to final adjudication herein.

281.

To further the conspiracy to falsify ICT Insurance Company's books, records and annual statement as of December 31, 1955, a scheme was entered into by and between Ben Jack Cage, JACCO of Texas, Nile E. Ball, B. F. Biggers, All States Life Insurance Company and C. D. Dunne to take out of ICT Insurance certain non-admitted assets in exchange for All States Life Insurance Company stock and over the year-end December 31, 1955, to then temporarily substitute cash for such All States Life Insurance Company stock which was likewise a non-admis-[fol. 285] sible asset in ICT Insurance. This scheme was carried out in the following manner: On or about August 26, 1955, an agreement was entered into as between Ben Jack Cage, JACCO of Texas and Nile E. Ball on the one hand, and B. F. Biggers on the other, whereby JACCO of Texas agreed to sell All States Life Insurance Company $257,500.00 of West Buechel Bonds, $100,000.00 of St. Michaels Mortgage Bonds, each in the amount of $50,000.00 and a $152,500.00 Chapman College Mortgage, for $510,-000.00 cash, which cash JACCO of Texas would then turn around and use on the same date to purchase from All States Life Insurance Company 102,328 shares of All States Life Insurance Company stock at such value of $510,000.00. That on the same date, JACCO of Texas would then turn around and transfer the 102,328 shares of All States Life Insurance Company stock to ICT Insurance in return for ICT Insurance Company's transferring to JACCO of Texas $50,000.00 worth of ICT Corp. stock, City of West Buechel Bonds, at the value of $174,960.00, a $50,000.00 contribution by JACCO of Texas to ICT Insurance Company's surplus and a credit to the reinsurance account between ICT Insurance and Continental Union Insurance Company in the amount of $243,140.00. On the same date of August 26,

1955, by letter from B. F. Biggers to Ben Jack Cage and/or JACCO of Texas, B. F. Biggers agreed as follows:

"August 26, 1955

Jack Cage and Company
ICT Building
Dallas, Texas

Gentlemen:

For valuable consideration, receipt of which is acknowledged, I agree with you as follows:

1. On December 29, 1955, I will purchase from you or your nominees 102,328 shares of no-par common voting stock of All States Life Insurance Company for $510,000.00, cash; provided only that you will at the [fol. 286] time of the purchase furnish me with an unconditional commitment from ICT Insurance Company, ICT Life Insurance Company, ICT Corporation and Jack Cage and Company (in satisfactory form), by the terms of which such parties agree to repurchase such stock from me, at my cost price, on or before January 4, 1956.

2. Between January 15, 1956, and March 14, 1956, I will make a second purchase of All States Life Insurance Company stock from you. The second purchase shall be of 42,917 shares, for $257,500.00 in cash, and you will have no obligation to make repurchase from me with respect to this second purchase.

Yours very truly,

/s/ B. F. Biggers"

At the same time, in connection with such transaction, Charles D. Dunne agreed with Ben Jack Cage and JACCO of Texas to purchase 59,411 shares of the All States Life Insurance Company stock for a consideration of $255,025.00.

282.

On or about August 26, 1955, such agreements were carried out in the following manner: On August 26, 1955, All

States Life Insurance Company executed its check to JACCO of Texas in the amount of $257,500.00 for the purchase of $257,500.00 of City of West Buechel Bonds. On the same date of August 26, 1955, All States Life Insurance Company executed its check in the amount of $50,000.00 to JACCO of Texas for the purchase of a $50,000.00 St. Michael's College Foundation Mortgage Bond. On the same date of August 26, 1955, All States Life Insurance Company executed its check to JACCO of Texas in the amount of $50,000.00 for the purchase of a $50,000.00 first mortgage bond of St. Michael's College Foundation, Inc. On the same date of August 26, 1955, All States Life Insurance Company issued its check in the amount of $152,500.00 to JACCO of Texas for the purchase of a $152,500.00 Chapman College Mortgage Note. On the same date of August 26, 1955, JACCO of Texas deposited all of these checks of All States Life Insurance Company totalling [fol. 287] $510,000.00 in JACCO of Texas account in the Republic National Bank. On the same date of August 26, 1955, JACCO of Texas executed to All States Life Insurance Company its check in the amount of $257,500 00 for the purchase of 42,917 shares at $6.00 per share of All States Life Insurance Company stock. On the same date, JACCO of Texas also issued its check to All States Life Insurance Company in the amount of $252,500.00 for the purchase of 59,411 shares of the common stock of All States Life Insurance Company at $4.25 per share. These two checks of JACCO of Texas totalled $510,000.00 paid to All States Life Insurance Company in return for 102,328 shares of All States Life Insurance Company stock. On the same date, JACCO of Texas transferred such 102,328 shares of All States Life Insurance stock to ICT Insurance at the consideration of $518,100.00 and caused ICT Insurance to show on its records that as a consideration for such stock, ICT Insurance transferred to JACCO of Texas $50,000.00 worth of ICT Corp. stock and $174,960.00 of City of West Buechel Bonds, received an alleged contribution to surplus of $50,000.00 from JACCO of Texas and received a credit of $243,140.00 on the reinsurance quota share treaty as between Continental Union and ICT Insurance. Such entries on ICT Insurance Company's books

showing that ICT Insurance was caused to give this consideration for the $518,100.00 worth of All States Life Insurance Company stock does not fully reflect the entire transaction. Actually, the consideration that ICT Insurance gave to JACCO of Texas in exchange for the $518,100.00 of All States Life Insurance Company stock was the same securities that JACCO of Texas had given to B. F. Biggers as hereinbefore alleged.

283.

As hereinbefore alleged, in connection with such transaction, Charles D. Dunne agreed to purchase from JACCO [fol. 288] of Texas 59,411 shares of the capital stock of All States Life Insurance Company at the consideration of $255,025.00. On August 5, 1955, Charles D. Dunne executed his promissory note in such amount of $255,025.00 to JACCO of Texas, due and payable on or before March 15, 1956, in exchange for 59,411 shares of the capital stock of All States Life Insurance Company. On the same date, Charles D. Dunne, by separate collateral agreement, pledged such 59,411 shares of the capital stock of All States Life Insurance Company to JACCO of Texas to secure to JACCO of Texas the payment of such note by Dunne.

284.

As hereinabove alleged, on August 26, 1955, ICT Insurance was caused to allegedly purchase the 102,328 shares of All States Life Insurance Company for the consideration hereinabove alleged, and such 102,328 shares of All States Life Insurance Company stock were, on August 26, 1955, entered in ICT Insurance Company's books as being owned by ICT Insurance at the value of $518,100.00, when in truth and in fact, 59,411 shares of such stock had on August 5, 1955, been sold to Charles D. Dunne and repledged to JACCO of Texas to secure the note in the amount of $255,025.00 that Charles D. Dunne had executed to JACCO of Texas as consideration for such stock. That furthermore, ICT Insurance was never delivered any stock certificate of All States Life Insurance Company representing the owner-

ship of such shares of stock of All States Life Insurance Company which were allegedly sold to ICT Insurance on August 26, 1955. By virtue of such dishonest and fraudulent acts of Ben Jack Cage, Nile E. Ball, B. F. Biggers, All States Life Insurance Company, Charles D. Dunne and JACCO of Texas, ICT Insurance was caused to illegally and wrongfully show that ICT Insurance owned 102,328 shares of All States Life Insurance Company's stock at a value of $518,100.00, when in truth and in fact, stock certificates representing such ownership was never transferred to ICT Insurance and 59,411 shares of such stock had [fol. 289] already been sold to Charles D. Dunne and such 59,411 shares sold to Charles D. Dunne were under pledge in such note executed by Charles D. Dunne to JACCO of Texas. That furthermore, such All States Life Insurance Company stock in the amount of 102,328 shares was not worth the value of $518,100.00 and such stock of All States Life Insurance Company was not an admitted asset in ICT Insurance for the reason that such stock was not stock of a corporation that had been existing for five years and had paid a dividend for a period of five years in compliance with Article 2.10 of the Insurance Code by reason of the fact that All States Life Insurance Company was incorporated in 1955. All of such facts herein alleged were known to these defendants, and by virtue of such knowledge and such fraudulent acts in causing ICT Insurance to enter into such transaction and to falsely carry such entries in its books, all of such defendants aided, abetted and furthered the conspiracy to falsify ICT Insurance Company's records in order to keep ICT Insurance operating in violation of law.

285.

As hereinbefore alleged, on August 26, 1955, in connection with and as a part of such transaction, B. F. Biggers agreed in the first paragraph of his agreement that on December 29, 1955, he would purchase from JACCO of Texas or its nominees, such 102,328 shares of All States Life Insurance Company's stock for $510,000.00 cash, provided only that JACCO of Texas would at the time of such purchase by B. F. Biggers furnish to B. F. Biggers an unconditional

commitment from ICT Insurance, ICT Life, ICT Corp. and JACCO of Texas (in satisfactory form) by the terms of which such parties would agree to repurchase such stock from B. F. Biggers at the same price of $510,000.00 on or before January 4, 1956. In paragraph two of the agreement, as hereinbefore set forth, it was further agreed by B. F. Biggers that between January 15, 1956 and March 14, 1956, [fol. 290] B. F. Biggers would make a second purchase of All States Life Insurance Company stock from JACCO of Texas or its nominees. It was agreed that the second purchase would be for 42,917 shares for $257,500.00 in cash, and that JACCO of Texas would have no obligation to make repurchase from B. F. Biggers with respect to this second purchase. As hereinbefore alleged, on August 8, 1955, JACCO of Texas sold 59,411 shares of such 102,328 shares to Charles D. Dunne and these 42,917 shares that B. F. Biggers agreed to repurchase between January 15, 1956 and March 14, 1956 represented the balance of such stock. At the time that such agreement was entered into, the defendants Ben Jack Cage, Nile E. Ball, B. F. Biggers, All States Life Insurance Company, JACCO of Texas and Charles D. Dunne knew that the All States Life Insurance Company was not an asset that could be carried as an admitted asset in ICT Insurance Company's annual statement as of December 31, 1955, and that such agreement by B. F. Biggers to take such stock out of ICT Insurance temporarily over the year-end to temporarily substitute cash in lieu thereof was for the sole purpose of falsifying ICT Insurance Company's annual statement in showing that ICT Insurance had $518,100.00 more admitted assets than it actually owned.

286.

On December 30, 1955, the agreement to take the 102,328 of All States Life Insurance Company's stock out of ICT Insurance Company's assets was carried out in the following manner: On December 30, 1955, Ben Jack Cage, JACCO of Texas and B. F. Biggers executed their note in the amount of $518,100.00 to the Republic Bank. The $518,100.00 was deposited on the same date to the account of JACCO of Texas and on the same date of December 30,

1955, JACCO of Texas executed its check in the amount of $518,100.00 to ICT Insurance for the alleged purchase from ICT Insurance of 102,328 shares of All States Life Insur- [fol. 291] ance Company stock that ICT Insurance was carrying in its books as owning. Such stock was allegedly transferred over to B. F. Biggers to be held by him subject to the agreement that such stock would be repurchased by January 4, 1956 as hereinabove alleged. At the time that the $518,100.00 was deposited in ICT Insurance Company's account, it was agreed by and between the parties that such $518,100.00 would remain on deposit in ICT Insurance Company's account in the Republic Bank and would be used on January 4, 1956 to allegedly repurchase such 102,328 shares of All States Life Insurance Company's stock from B. F. Biggers and that such $518,100.00 cash could then be used to repay such note of B. F. Biggers, JACCO of Texas and Ben Jack Cage that had been executed to the Republic Bank as hereinbefore alleged on December 30, 1955.

287.

That in connection with such transaction, on December 30, 1955, to induce B. F. Biggers to carry out his agreement of August 26, 1955, to repurchase the 102,328 shares of All States Life Insurance Company's stock out of ICT Insurance over the year-end, and to substitute temporarily in lieu thereof, cash, in the amount of $518,100.00, an agreement was made with B. F. Biggers to void paragraph two of B. F. Biggers' letter of August 26, 1955, whereby B. F. Biggers had originally agreed to between January 15, 1956, and March 14, 1956, make a second purchase of All States Life Insurance Company's stock in the amount of 42,917 shares for $257,500.00 in cash with no obligation of ICT Insurance to make a repurchase from B. F. Biggers of such stock. The effect of such resolution was to ratify and confirm the agreement as between B. F. Biggers and ICT Insurance for B. F. Biggers to temporarily allegedly purchase the 102,328 shares of All States Life Insurance Company's stock out of ICT Insurance over the year-end and to temporarily substitute cash in lieu thereof and thereby falsely [fol. 292] show that ICT Insurance had $518,100.00 more

admissible assets in its annual statement than it actually owned.

288.

In ICT Insurance Company's annual statement as of December 31, 1955, ICT Insurance was caused to falsely show that it had a free and unencumbered asset of $518,-100.00 in cash on deposit in the Republic Bank. At the time that such transactions were entered into and carried out as hereinabove alleged, B. F. Biggers, Ben Jack Cage, Nile E. Ball, JACCO of Texas, All States Life Insurance Company, Paul C. Sparks and William J. Harris knew that the whole transaction was a year-end window-dressing transaction to temporarily substitute over the year-end $518,-100.00 cash in lieu of non-admissible assets in the form of such 102,328 shares of All States Life Insurance Company's stock which ICT Insurance allegedly owned and through such transaction falsely represent that ICT Insurance owned such cash in the amount of $518,100.00, when in truth and in fact, as hereinbefore alleged, such $518,100.00 was merely substituted for such stock of All States Life Insurance Company and which $518,100.00 as of December 31, 1955, was earmarked for the repurchase of such 102,328 shares of All States Life Insurance Company's stock on January 4, 1956, in order that such cash could be used to repay such loan of B. F. Biggers, Ben Jack Cage and JACCO of Texas to the Republic Bank. By reason of such dishonest and fraudulent acts, Ben Jack Cage, Nile E. Ball, Paul C. Sparks, and William J. Harris breached their fiduciary duties to ICT Insurance, and B. F. Biggers, All States Life Insurance Company and JACCO of Texas aided such officers and directors in the breach of such fiduciary duty, all of which defendants joined, aided and abetted the conspiracy in keeping ICT Insurance operating in violation of law by falsifying ICT Insurance Company's annual statement as of December 31, 1955, in the amount of $518,100.00.

[fol. 293] 289.

As hereinbefore alleged, as of December 31, 1955, ICT Insurance carried the 893,000 shares of ICT Life Insurance Company's stock at a book value of $655,489.87. To further

the conspiracy to falsely show ICT Insurance in a solvent financial condition, the Board of Directors of ICT Insurance, by resolution, voted to increase the value of such 893,000 shares of ICT Life stock at a book value of $655,489.87 to a market value of $2.00 per share, or a total market value of $1,787,000.00, or an increase of market value over such book value of $1,131,510.13 as of December 31, 1955, in order that ICT Insurance could wrongfully show in its annual statement as of December 31, 1955, that ICT Insurance owned such 893,500 shares of ICT Life stock at such total value of $1,787,000.00.

290.

At the time that such transaction was entered into, such directors knew that the market value of such stock of ICT Insurance was not of the value of $1,787,000.00. Furthermore, such directors knew that under Article 2.10 of the Insurance Code, such stock of ICT Life could not be carried as an admitted asset in ICT Insurance for statement purposes by reason of the fact that ICT Life had not been in existence for a period of five years and had not paid dividends for a period of five years. Furthermore, these directors knew that even though such stock might have been an admissible asset in ICT Insurance, that such stock could not be carried for more than the book value as reflected in the books of ICT Life under the rules and regulations of the Board of Insurance Commissioners. These directors knew that such transaction was entered into for the sole purpose of creating additional assets in ICT Insurance in the amount of $1,131,510.13 in order to falsely represent in ICT Insurance Company's annual statement that ICT Insurance had such amount of additional assets in order to show ICT Insurance in a solvent financial condition. By reason of such dishonest and fraudulent acts, these de- [fol. 294] fendants breached their fiduciary duty to ICT Insurance and joined, aided, abetted and furthered the conspiracy.

291.

As hereinbefore shown, the last examination of ICT Insurance by the Board of Insurance Commissioners was

made on June 30, 1952. As hereinbefore further alleged, under Article 1.15 of the Texas Insurance Code, the Board of Insurance Commissioners was required to examine ICT Insurance every two years. As hereinbefore further shown, ICT Insurance was due for an examination as of June 30, 1954, and by reason of the fact that Ben Jack Cage knew that ICT Insurance was hopelessly insolvent, and could not stand a convention examination of ICT Insurance whereby other states would participate in such examination, Ben Jack Cage, through the bribes hereinbefore alleged, induced J. Byron Saunders and Garland A. Smith to violate their sworn oath of office as members of the Board of Insurance Commissioners and as public officials not to make such examination as of June 30, 1954 as required by such mandatory provisions of Article 1.15 of the Insurance Code, and to put off the making of such examination for a later time. Under the practices and regulations of the Board of Insurance Commissioners, a company was not notified that it was to be examined prior to the date as of such examination called by the Board of Insurance Commissioners. Contrary to such practices and regulations of the Board, some time in August or prior thereto, at a date well known to Ben Jack Cage, he was advised that ICT Insurance was to be examined as of September 30, 1955. That in order to falsely represent that as of September 30, 1955, the effective date of such examination that was to be made by the Board of Insurance Commissioners, that ICT Insurance was in a solvent financial condition, the additional following illegal, wrongful and fraudulent transactions were entered into in order to increase ICT Insurance Company's assets and to decrease its liabilities and thereby [fol. 295] falsely show at such examination date that ICT Insurance had the capital as required by law to continue its operation.

292.

As hereinbefore shown, in connection with the third contract of purchase as between Pierce P. Brooks on the one hand and Ben Jack Cage, JACCO of Alabama and ICT Corp. on the other, on September 22, 1955, Ben Jack Cage,

JACCO of Alabama and ICT Corp. agreed to purchase 7,438 shares of National Bankers Life Insurance Company stock at the total consideration of $3,598,000.00. On September 21, 1955, ICT Insurance received $1,564,515.94 from National Bankers Life Insurance Company in exchange for securities, as hereinbefore alleged, that were transferred by ICT Insurance to National Bankers Life Insurance Company. This entire $1,564,515.94 was earmarked on such date that ICT Insurance received such cash for the repayment to Pierce P. Brooks under the contracts and obligations of ICT Corp. and JACCO of Alabama to Pierce P. Brooks for the purchase of the 7,438 shares of stock of National Bankers Life Insurance Company. As hereinbefore alleged on the same date of September 21, 1955, $364,515.94 of such assets of ICT Insurance was illegally and wrongfully disbursed to Pierce P. Brooks and made up a part of the $999,000.00 cash payment to Brooks on September 21, 1955, under such third contract of sale. This left a balance of $1,200,000.00 of such $1,564,515.94 in ICT Insurance Company's bank accounts as of September 21, 1955. By reason of the fact that ICT Insurance was to be examined as of September 30, 1955, and in order to falsely represent that as of such date ICT Insurance had cash in the amount of $1,200,000.00 free and unencumbered, it was agreed by and between Ben Jack Cage, Pierce P. Brooks and ICT Corp. that although the $1,200,000.00 was earmarked and was agreed to be paid to Pierce P. Brooks as hereinbefore alleged, that such money would not be paid over to Pierce P. [fol. 296] Brooks in the performance of ICT Corporation's and JACCO of Alabama's obligations until October 4, 1956, which date was subsequent to such effective date of the examination of September 30, 1955. As hereinbefore alleged, such agreement was carried out by reason of the fact that the $1,200,000.00 was permitted to temporarily remain in ICT Insurance Company's bank accounts until October 4, 1955, at which date such $1,200,000.00 was paid over to Pierce P. Brooks.

293.

To further the conspiracy to falsify ICT Insurance Company's examination report, Ben Jack Cage, Francis J.

Knoll, James G. Cage, Edmund B. Welshans, W. Leslie Miller, JACCO of Texas, ICT Corp., Missouri Union Corporation and Missouri Union Insurance Company entered into a scheme to organize the Missouri Union Insurance Company without the required capital and surplus in the amount of $500,000.00, as required under the Missouri laws, through the use of borrowed money, and then to turn around and cause ICT Insurance to enter into a reinsurance treaty with Missouri Union Insurance Company in order that through such means, ICT Insurance could reduce its liabilities and thereby increase its surplus and through such means further falsify such examination of ICT Insurance as of September 30, 1955. This scheme was carried out in the following manner: On September 21, 1955, ITC Corp. borrowed $225,000.00 from the Mercantile Bank at Dallas and put up as security therefor $220,000.00 par value U.S. Treasury Bonds and a Cashier's Check in the amount of $20,000.00. The $220,000.00 of U.S. Treasury Bonds that ICT Corp. put up as security for such $225,000.00 loan in the Mercantile Bank were U.S. Treasury Bonds owned by the Atlas Insurance Company, Birmingham, Alabama, and the American Armed Forces Underwriters of Birmingham, Alabama, which companies were owned and controlled by Ben Jack Cage and which U.S. Treasury Bonds belonged to such companies. The $20,000.00 Cashier's Check was purchased out of the funds [fol. 297] of Oxford Corporation, which was another Ben Jack Cage controlled company. ICT Corp. took this $225,000.00 received under this loan, together with $195,000.00 other money, which made a total of $420,000.00 and sent such cash to the Boatmen's National Bank, St. Louis, Missouri, for deposit to the account of Missouri Union Corporation as a loan to Missouri Union Corporation. Missouri Union Corporation was a holding company organized in connection with Missouri Union Insurance Company, and this $420,000.00 together with other monies making up $500,000.00, was transferred to Missouri Union Insurance Company by Missouri Union Corporation for the incorporation of Missouri Union Insurance Company, which $500,000.00 was used by Missouri Union Insurance Company to

obtain its charter and certificate of authority to commence doing an insurance business. After obtaining such charter and certificate of authority, Missouri Union Insurance Company paid $300,000.00 to ICT Corp. out of such $500,000.00 that was used as Missouri Union Insurance Company's original capital and surplus and ICT Corp. then used $225,000.00 of such $300,000.00 received from Missouri Union Insurance Company to pay its $225,000.00 loan at the Mercantile Bank on October 5, 1955. At a later date, ICT Corp. attempted to replace such $300,000.00 by transferring to Missouri Union Insurance Company 300 shares of National Bankers Life Insurance Company stock at the value of $1,000.00 per share. At the time that such National Bankers Life Insurance Company stock was substituted by ICT Corp. in Missouri Union Insurance Company at such value of $300,000.00, all these defendants knew that such stock was not worth such value, and in February 1956, in order to falsify Missouri Union Insurance Company's annual statement as of December 31, 1955, ICT Insurance was caused to temporarily give to Missouri Union Insurance Company $300,000.00 in order that Missouri Union Insurance Company then could falsely represent that as of December 31, 1955, Missouri Union Insurance Company had $300,000.00 in U.S. Government Bonds that it had pur- [fol. 298] chased with such $300,000.00 cash as an admissible and unencumbered asset.

294.

In December 1955, a reinsurance treaty was executed as between ICT Insurance and Missouri Union Insurance Company whereby it was agreed that as of September 30, 1955, Missouri Union Insurance Company assumed all of the casualty business written by ICT Insurance in the State of Missouri. Under such reinsurance treaty, ICT Insurance allegedly ceded to Missouri Union Insurance Company, $847,220.00 of unearned premium reserves and $300,172.53 loss reserves. In connection with such transaction, ICT Insurance was caused to show in its books that as of September 30, 1955, ICT Insurance transferred to Missouri Union $50,000.00 in cash, 300 shares of capital stock of National Bankers Life Insurance Company at the value

of $300,000.00, agents' balances in the amount of $365,275.12, and premium notes in the amount of $24,533.13. The effect of such transaction was that ICT Insurance as of September 30, 1955, increased its surplus in the amount of $338,888.00 and rid itself of non-admitted assets in the form of National Bankers Life Insurance Company stock in the amount of $300,000.00 and agents' balances in the approximate amount of $70,000.00. In connection with such reinsurance treaty as between ICT Insurance and Missouri Union Insurance Company, a treaty was entered into as between Missouri Union Insurance Company and Continental Union whereby 50 per cent of the business hereinabove stated which Missouri Union Insurance Company assumed from ICT Insurance was retroceded on to Continental Union Insurance Company together with the future direct writings of Missouri Union Insurance Company. The Missouri Insurance Department disapproved of such reinsurance treaty, whereupon in December 1955, Missouri Union Insurance Company and Continental Union cancelled such treaty and in December 1955, ICT Insurance and Missouri Union Insurance Company entered into another [fol. 299] reinsurance treaty dated retroactively to September 30, 1955 whereby Missouri Union Insurance Company allegedly retroceded back to ICT Insurance 50 per cent of the business that it had assumed from ICT Insurance together with future direct writings of Missouri Union Insurance Company.

295.

Such examination of ICT Insurance as of September 30, 1955, commenced in October or November of 1955 and was completed on April 6, 1956. Such examination was a convention examination in which other states in which ICT Insurance was doing business participated. The examiner in charge of such examination was E. B. Kelley, representing the Board of Insurance Commissioners of the State of Texas. Also participating were: R. L. Ferguson, representing the State of Mississippi and the states included in Zone 3 of the National Association of Insurance Commissioners; and Harry J. Aden, representing the State of

Oregon and the states in Zone 6 of the National Association of Insurance Commissioners.

296.

Such examination was concluded by such examiners on the 6th day of April 1956 and in which examination ICT Insurance was shown as being solvent, as having a $1,500,000.00 capital and surplus in the amount of $383,584.43, when in truth and in fact, ICT Insurance did not have capital and surplus in such amount for the following reasons:

(1) On page 32 of such report, and on page 28, it was stated that ICT Insurance owned All States Life Insurance Company stock at the value of $537,222.00, when in truth and in fact, as hereinbefore alleged, such stock was not an admissible asset in ICT Insurance and was not worth such value, and on September 30, 1955, ICT Insurance had never been delivered certificates of All States Life Insurance Company representing such 102,328 shares of stock, and [fol. 300] furthermore, as hereinbefore shown, 59,411 of such shares had previously been sold to and were owned by Charles D. Dunne.

(2) On page 32 and on page 28, it was stated that ICT Insurance owned 1,077 shares of the capital stock of National Bankers Life Insurance Company at the value of $733,113.90, when in truth and in fact, as hereinbefore shown, such stock was not worth such value of $733,113.90.

(3) On page 32 and on page 28, it was stated that ICT Insurance owned A.R.A. Manufacturing Company stock at the value of $200,000.00, when in truth and in fact, as hereinbefore alleged, such stock was not an admissible asset in ICT.

(4) On page 34 and on page 28, it was stated that ICT Insurance owned as an asset a mortgage loan in the amount of $100,000.00 on the Central Expressway Property, when in truth and in fact, as hereinbefore shown, such mortgage did not comply with Article 2.10 of the Insurance Code and was not an admissible asset in such value of $100,000.00 in ICT Insurance.

(5) On page 36 and on page 28, it was stated that ICT Insurance owned an equity in the amount of $279,171.51 in the building owned by ICT Insurance in Miami Beach, Florida, when in truth and in fact, as hereinabove alleged, the value of such building was blown up in ICT Insurance Company's books and records in the amount of $242,312.10 by reason of the fact that ICT Insurance simultaneously paid Continental Union such amount more than Continental Union had just paid for such building.

(6) On page 40 and on page 28, it was stated that ICT Insurance had cash in banks in the amount of $1,272,755.29, when in truth and in fact, as hereinbefore shown, $1,200,000.00 of such cash in banks was encumbered and earmarked for the payment over to Pierce P. Brooks on the obligations of ICT Corp. and JACCO of Alabama on the purchase of the National Bankers Life Insurance Company stock from Pierce P. Brooks by ICT Corp. and [fol. 301] JACCO of Alabama.

(7) On page 41 and on page 28, it was stated that ICT Insurance owned as an asset a balance due from Continental Union in the amount of $506,868.63, when in truth and in fact, as hereinbefore shown, Continental Union was insolvent and such receivable was worthless.

(8) On page 28, the unearned premium reserve was reduced by $1,894,152.75, and the outstanding loss reserve was reduced by $1,297,937.39 by reason of the reinsurance treaty as between Continental Union and ICT Insurance, which treaty as hereinbefore shown, was fictitious and worthless by reason of the fact that Continental Union was insolvent and that by giving effect to such treaty, ICT Insurance was caused to show that it had $473,538.19 more surplus than it actually possessed. That since in truth and in fact, such treaty was worthless, Continental Union owed an additional balance to ICT Insurance of $2,718,550.95, and being insolvent, Continental Union could not pay such balance due ICT Insurance.

297.

That in connection with such examination, the question arose as to whether or not the reinsurance transaction as between ICT Insurance and Missouri Union Insurance Company, as hereinbefore set forth, should be given effect to in such examination report. By giving effect to such reinsurance treaty which was done and by carrying the worthless assets and liabilities hereinbefore discussed at such values as were carried in the examination report, ICT Insurance was shown to have a surplus in the amount of $383,584.43. By disapproving the reinsurance treaty as between ICT Insurance and Missouri Union Insurance Company, this transaction in and of itself would have made ICT Insurance insolvent. Since such reinsurance treaty as between ICT Insurance and Missouri Union was a portfolio reinsurance as between ICT Insurance and Missouri Union Insurance Company, it required the ap- [fol. 302] proval of the Board of Insurance Commissioners of the State of Texas. On or about December 1955, such reinsurance treaty upon its execution was submitted to J. Byron Saunders and Garland A. Smith of the Texas Board of Insurance Commissioners for their approval, retroactive back to September 30, 1955. On April 2, 1956, J. Byron Saunders caused said reinsurance treaty as between Missouri Union Insurance Company and ICT Insurance to be approved retroactive back to September 30, 1955 against the advice of the legal counsel for the Board, Paul D. Connor. That at the time that J. Byron Saunders caused said reinsurance agreement to be approved, he knew and was charged with knowledge that if such reinsurance treaty had not been approved, there would have to be a reversal of the assets and liabilities that were transferred as between Missouri Union Insurance Company and ICT Insurance as hereinbefore set forth. That in making such reversal, the assets that would be returned and the liabilities that would be assumed by ICT Insurance would have to be revalued and in such revaluation, ICT Insurance would be caused to show a capital impairment or an insolvent condition. That in violation of his sworn oath of office, and his duties to ICT Insurance, and its claimants, creditors, policyholders, stockholders, and the

public, J. Byron Saunders, knowing such fact, wrongfully and in violation of his sworn oath of office, caused such reinsurance treaty to be approved and ICT Insurance to continue to operate although it was insolvent, all by virtue of the bribes paid to J. Byron Saunders by Ben Jack Cage, as hereinbefore alleged. That furthermore, by reason of such illegal, wrongful and fraudulent acts, J. Byron Saunders aided, furthered and abetted the conspiracy in keeping ICT Insurance operating in violation of law.

298.

That in the course of such examination, James G. Cage [fol. 303] caused JACCO of Texas to issue its check in the amount of $94.49 to Braniff International Airways for a round-trip ticket for Harry J. Aden to go to Nebraska and return to Dallas for Harry J. Aden's own personal use and benefit. During the course of the examination, James G. Cage likewise caused JACCO of Texas to pay the expenses of R. L. Ferguson to Jackson, Mississippi, and return to Dallas for his own personal benefit. That at the time, the examiners E. B. Kelley, R. L. Ferguson and Harry J. Aden knew and/or are charged with knowledge that had not the reinsurance treaty as between ICT Insurance and the Missouri Union Insurance Company been given effect in such examination, this transaction alone would have resulted in showing that ICT Insurance was in an insolvent condition in such examination report; that, furthermore, at the time that such examiners made their report of April 6, 1956, these examiners either knew that the statements hereinbefore alleged in such examination report were false or by the exercise of any reasonable amount of diligence they could have determined that such statements were false. By reason of such actions, such examiners joined, aided and abetted in making a false examination report of ICT Insurance and furthered, aided and abetted the conspiracy.

299.

By reason of the illegal, wrongful and fraudulent acts of Ben Jack Cage, Francis J. Knoll, Pierce P. Brooks,

National Bankers Life Insurance Company, ICT Corp., JACCO of Alabama, JACCO of Texas, Missouri Union Insurance Company, Missouri Union Corporation, Edmund B. Welshans, W. Leslie Miller and James G. Cage in joining, aiding and participating in falsifying such examination report through the transactions hereinbefore alleged, all of such defendants joined, aided and abetted in the falsifying of ICT Insurance Company's examination re-[fol. 304] port of September 30, 1955, and furthered the conspiracy to keep ICT Insurance operating in violation of law although ICT Insurance was hopelessly insolvent.

300.

After having entered into the transactions hereinbefore alleged, the annual statement of ICT Insurance as of December 31, 1955, was prepared under the direction and supervision of the officers and directors of ICT Insurance and was submitted to the Board as required by law. The annual statement was sworn to by James G. Cage, Executive Vice President, E. A. McSpadden, Secretary, and E. A. McSpadden, Treasurer, and was filed with the Board in Austin, Travis County, Texas. The annual statement contained at least the following false statements:

(a) On page 20, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 893,500 shares of the capital stock of ICT Life at the value of $1,787,000.00, when in truth and in fact, as hereinbefore shown, such stock was not worth such value and was not an admissible asset.

(b) On page 20, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 5,852 shares of the capital stock of American Bankers Life Insurance Company at the value of $117,040.00, when in truth and in fact, such stock was not worth more than approximately $9,480.24.

(c) On page 20, schedule D, part 2, "Stocks Owned as of December 31, of Current Year," and on page 2, it was stated that ICT Insurance owned 20,000 shares of the Pre-

ferred Stock of A.R.A. Manufacturing Company at the value of $200,000.00, when in truth and in fact, such stock was not an admissible asset as hereinbefore shown.

(d) On page 3, under "Liabilities, Surplus and Other [fol. 305] Funds," it was stated that ICT Insurance had total liabilities of only $5,895,342.13, when in truth and in fact, such liabilities were greater in the amount of $410,309.20 by reason of the fact that as of December 31, 1955, ICT Insurance still had outstanding its note to O. P. Leonard which ICT Insurance had executed to O. P. Leonard in the purchase of A.R.A. Manufacturing Company and which liability was not listed as a liability in ICT Insurance Company's annual statement.

(e) On page 20, schedule D, part 2, "Stocks Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned 3,101 shares of the capital stock of National Bankers Life Insurance Company at the value of $1,864,515.94, when in truth and in fact, 1,724 of such shares were on pledge to Pierce P. Brooks in the South Main State Bank of Houston, Texas, to secure the indebtedness owed by JACCO of Alabama and ICT Corp. to Pierce P. Brooks as hereinbefore shown and furthermore, all of such stock was worthless.

(f) On page 19, schedule D, part 1, "Bonds Owned December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset $355,200.00 worth of Chapman College First Mortgage Bonds, when in truth and in fact, such bonds were worthless.

(g) On page 3, under "Liabilities, Surplus and Other Funds as of December 31 of Current Year," it was stated that as of December 31, 1955, ICT Insurance had total liabilities of only $5,895,342.13, when in truth and in fact, such liabilities were greater in the amount of $1,575,000.00 by reason of the fact that as of December 31, 1955, ICT Insurance had been caused to guarantee the indebtedness of Continental Union under its premium income notes to Chapman College in the amount of $1,575,000.00 as hereinbefore alleged.

(h) On page 19, schedule D, part 1, "Bonds Owned as [fol. 306] of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned First Mortgage Bonds of Dunne Press at the value of $4,936.40, when in truth and in fact, such bonds were not an admissible asset and were worthless.

(i) On page 16, under schedule A, part 1, "Real Estate Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset the Florida Building at a market value less encumbrances in the amount of $279,171.51, when in truth and in fact, such value was inflated in the amount of $242,312.10 as hereinbefore alleged by virtue of the fact that ICT Insurance was caused to pay such amount more for such building than had actually been paid the day before by Continental Union to the original sellers of the building.

(j) On page 17, under schedule B, "Mortgages Owned as of December 31 of Current Year," and on page 2, it was stated that ICT Insurance owned as an admissible asset a $95,000.00 mortgage on the Central Expressway Property, Dallas, Texas, when in truth and in fact, such mortgage was not worth $95,000.00 and was not an admissible asset as hereinbefore alleged.

(k) On page 29, under schedule N, showing bank balances as of December 31, 1955, it was stated that ICT Insurance had on deposit in the Republic National Bank, $923,157.54 free and unencumbered, when in truth and in fact, $518,100.00 of such amount was encumbered by reason of the fact as hereinbefore alleged, such cash was temporarily substituted over the year-end in place of the All States Life Insurance Company stock and such amount of $518,100.00 was earmarked for the repurchase of such stock of All States life Insurance Company on January 4, 1956.

(l) On page 24, under schedule F, part 1 (a), "Ceded Reinsurance as of December 31 of Current Year," it was stated that ICT Insurance had ceded to Continental Union loss reserves in the amount of $1,386,031.17 and unearned premium reserves in the amount of $1,485,009.75 and on

[fol. 307] page 3, "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had surplus as regards policyholders in the amount of $3,436,530.49, when in truth and in fact, such statements were false by reason of the fact as hereinbefore alleged, the reinsurance treaty between ICT Insurance and Continental Union was a subterfuge and was worthless and therefore ICT Insurance Company's surplus was less in the amount of $371,252.44.

(m) On page 3, under "Liabilities, Surplus and Other Funds," it was stated that ICT Insurance had a surplus as regards policyholders in the total amount of $3,436,530.49, when in truth and in fact, by virtue of the fictitious reinsurance transactions as between ICT Insurance and Continental Union, there was created an amount due on reinsurance balances from Continental Union to ICT Insurance totalling $2,982,868.80, which balance was uncollectible and was worthless as an asset in ICT Insurance Company's statement due to the fact that Continental Union was insolvent and did not have the assets with which to pay such liabilities to ICT Insurance and therefore ICT Insurance did not have surplus as regards policyholders in such amount of $3,436,530.49 as stated on page 3 of the annual statement for the reason that such surplus would be decreased in the amount of $2,982,868.80 by virtue of the fact that such receivable in such amount of $2,982,868.80 was worthless.

(n) On page 3, under Liabilities, Surplus and Other Funds, it was stated that as of December 31, 1955, ICT Insurance had a capital of $1,500,000.00 and unassigned or surplus funds in the amount of $1,936,530.49, or a total surplus as regards policyholders in the amount of $3,436,530.49, when in truth and in fact, ICT Insurance had no capital and had no surplus and was hopelessly insolvent.

[fol. 308] 301.

During the year 1955, and at the time the December 31, 1955 annual statement of ICT Insurance was prepared, and at the time said statement was submitted to the Board of Insurance Commissioners, the following defendants were

Officers and/or Directors and/or Trustees of ICT: Nile E. Ball, Ben Jack Cage, John G. Vaughan, Francis J. Knoll, James G. Cage, Freeman Everett, William J. Harris, Marcus Loftis, Kenneth Mabry, M. M. McKnight, J. A. McMahon, Jr., Paul C. Sparks, J. H. Abright, Doris Baker, William A. Cullen, W. S. East, Eddie Gross, Charles Jones, P. C. Klein, Fred Lucas, W. C. McMasters, W. L. Pickens, C. R. Saunders, L. A. Townsend, J. M. West, Walter Wideman, Frank Yeager, Vernon Evans, E. C. Gones, Ray Johnson, Walton N. Newman, Frank Owens, Claude Ritchie, Bill Sams, Ed Weimar, T. W. Wheeler, C. L. Wisseman, Carl Knight, Steve Booke, C. O. Blackburn, Arthur B. Eaton, Stanley E. Prichard, E. A. McSpadden. At the time that these false, fraudulent financial transactions were entered into, and at the time that the false statements were made in the annual statement, and at the time that such annual statement was submitted to the Board of Insurance Commissioners, each of these defendants participated in and/or knew of and/or were charged with knowledge of the fraudulent financial transactions and that some or all of such statements were false, or as Officers and/or Directors, they negligently and carelessly permitted such fraudulent transactions to be entered into and such statements to be made and submitted to the Board, when with ordinary care in exercising their duty, and as Officers or Directors, they could have, and should have, known the true facts. They made, caused to be made, or negligently and carelessly permitted such representations to be made, with the intent that the same should be submitted to the Board of Insur-[fol. 309] ance Commissioners for the purpose of causing the Board to rely upon such statements and to induce said Board to issue a Certificate, certifying that ICT Insurance had complied with the laws of Texas and was authorized to continue to do business in the State of Texas for the year 1956. Each of such defendants knew, or by virtue of his office should have known, or was charged with knowledge of the law, that a Certificate of such Compliance would be circulated as required by law, and that its publication would be a representation to the public and to the then existing and prospective creditors, claimants, policyholders, stockholders and stock subscribers that ICT Insurance

had complied with the laws of Texas, and that it was possessed of the capital and surplus required by law to permit its continued operation. These wrongful acts, therefore, were a fraud perpetrated as against ICT Insurance and these classes of persons, and was a breach of such Officers' and Directors' fiduciary duty to ICT Insurance, and were a part of and in furtherance of and in aid of the conspiracy; that by the hereinabove alleged acts of the persons and entities, hereinabove named, other than such officers and directors, in entering into, aiding, participating, and joining in the fraudulent acts hereinbefore alleged which were entered into to fictitiously increase ICT Insurance Company's assets and fictitiously lower its liabilities, such persons joined in, aided and abetted the Officers and Directors in the making of such false and fraudulent December 31, 1955 annual statement of ICT Insurance, and thereby aided and abetted such Officers and Directors in the breach of their fiduciary duty to ICT Insurance; all of which acts were a part of and in furtherance of, and in aid of the conspiracy to keep ICT Insurance operating in violation of law. The false statements in ICT Insurance Company's annual statement and submitted by its Officers to the Board were statements made directly to the Board, were statements made as to material facts and was, and were, relied upon by [fol. 310] said Board as the truth, and did cause the Board to issue a Renewal Certificate of Authority to ICT Insurance to continue to do business in 1956, together with a Certificate of Publication which was published in two newspapers of wide circulation as required by law.

302.

To further the conspiracy, some time during the year 1956, after the annual statement was prepared and filed, and at a date well known to the defendants, the financial statement of ICT Insurance in pamphlet form was again prepared and widely distributed to the existing and prospective claimants, creditors, stockholders, insurance agents and policyholders of ICT Insurance. On the front of such pamphlet was a statement: "Statement of Condition—December 31, 1955—ICT Insurance Company." On one portion of the pamphlet was a financial statement showing ICT In-

surance Company's assets and liabilities as of December 31, 1955, to be the same as shown on pages 2 and 3 of ICT Insurance Company's December 31, 1955, annual statement, and showing a capital of $1,500,000.00; unassigned surplus, $1,936,530.40; and surplus as regards policyholders, $3,436,530.49. Certain of the assets and liabilities used to make up such pamphlet statement to show such capital and surplus were false for the same reason as hereinbefore shown, they were false in the December 31, 1955 annual statement of ICT Insurance. On one side of the financial pamphlet there were listed the Officers and Directors of ICT Insurance Company.

303.

At the time that these financial pamphlets were made and published, the Officers and Directors hereinabove named knew that these statements were false or as Officers and/or Directors they negligently and carelessly permitted such statements to be made and published, when with ordinary care in exercising their duties as officers and/or directors, they could have, and should have, known the true facts. [fol. 311] These defendants made and published, caused to be made and published, or negligently permitted to be made and published, the statements with their names thereon with the purpose and intent that such statements be relied upon by existing and prospective innocent policyholders, creditors and stockholders to induce them to invest in ICT Insurance and to extend ICT Insurance credit. Likewise, all the defendants as hereinbefore alleged who participated in the false and fraudulent financial manipulations in aid of the creation of the false assets and concealment of liabilities through such acts as hereinbefore alleged, aided such officers and directors in the breach of their fiduciary duty in connection with the publication and issuance of such financial pamphlets. These false representations in such pamphlets were made as to material facts and were relied upon by the classes of persons to whom they were made. Such wrongful acts were wrongs as against ICT Insurance and its claimants, creditors, stockholders and policyholders by reason of the fact that pursuant to such wrongful acts, ICT Insurance was caused to

incur further liabilities and obligations that it could not meet. Such wrongful acts by such officers and/or directors were a breach of their fiduciary duty to ICT Insurance and aided, abetted and furthered the conspiracy and became a part thereof.

304.

During the year 1956, ICT Insurance was caused to continue to sell and issue its insurance policies and thereby created additional liabilities that ICT Insurance could not pay, by reason of its insolvent condition. Therefore, in order to show that ICT Insurance had sufficient assets to meet its liabilities and to show a solvent financial condition during the year 1956, additional fraudulent and illegal transactions and manipulations were entered into, all of which were in furtherance of the conspiracy to keep ICT Insurance operating in violation of law although ICT Insur- [fol. 312] ance was hopelessly insolvent.

305.

Some time in the latter part of 1955, negotiations commenced for the cancellation of the management contract as between JACCO of Texas and ICT Insurance. On January 27, 1956, such management contract was mutually cancelled by written instrument executed by JACCO of Texas, Ben Jack Cage and Nile E. Ball on the one hand and by a majority of the Board of Directors of ICT Insurance on the other. On the same date, agreements were likewise entered into cancelling the management contract as between JACCO of Texas, ICT Corp. and ICT Life. In connection with the cancellation of such management contract as between ICT Insurance and JACCO of Texas, it was agreed that an audit would be made of JACCO of Texas' records and books to determine the liabilities as between JACCO of Texas and ICT Insurance. Subsequent to such agreement, William S. Skiles, a certified public accountant, was engaged to make and did make an audit of the records and affairs of JACCO of Texas. That furthermore, in connection with the cancellation of the management contract as between ICT Insurance and JACCO of Texas and the cancellation of the management contract as between JACCO

of Texas, ICT Corp, and ICT Life, on March 23, 1956, an Agreement, Assignment, Pledge and Mortgage was executed as between JACCO of Texas, ICT Insurance, ICT Corp. and ICT Life whereby all of the assets of JACCO of Texas were transferred to three trustees; one each appointed by ICT Insurance, ICT Corp. and ICT Life, to hold such assets for the benefit of ICT Insurance, ICT Corp. and ICT Life for any indebtedness owing to such companies by JACCO of Texas and with the understanding and agreement that such assets that JACCO of Texas held by such trustees on behalf of such companies would be transferred to such companies to satisfy any indebtedness found to be [fol. 313] due and owing by JACCO of Texas to such companies.

306.

As hereinbefore alleged, in 1950, Jack Cage and Company was a co-partnership with Ben Jack Cage and Jack V. Cage as partners. That in 1951, JACCO of Texas, a corporation, was organized with Ben Jack Cage, Nile E. Ball and John G. Vaughan as its principal stockholders, officers, and/or directors. That as hereinbefore further alleged in 1950, JACCO of Texas, the co-partnership and its successor, JACCO of Texas, a corporation, was given the management contract of ICT Insurance under the terms of which JACCO of Texas received 15 per cent of the gross net premiums written by ICT Insurance and 20 per cent commission on the sale of ICT Insurance stock. That such management contract and amendments thereto remained in existence from 1950 until its termination on January 27, 1956, as herein alleged. During all or substantially all of the time that such management contract was in force as hereinbefore shown, Ben Jack Cage, Nile E. Ball and John G. Vaughan were either officers and/or directors and/or employees of ICT Insurance. That during such period of time, approximately $7,000,000. was paid to JACCO of Texas and these defendants as commissions on insurance premiums written by ICT Insurance and approximately $3,000,000. was paid to JACCO of Texas and these individuals as commissions on the sale of stock. That as hereinbefore shown, during all of such time that ICT Insur-

ance was in existence, and during all of the time that such management contract was in existence, and during all of the time that these defendants took and received such approximate amount of $7,000,000.00 as commissions on insurance premiums and approximately $3,000,000.00 as commissions on the sale of ICT Insurance stock, these defen- [fol. 314] dants knew that ICT Insurance was insolvent and that these funds taken by these defendants as commissions on the insurance premiums and stock sales were trust funds belonging to ICT Insurance and its creditors, policyholders, claimants and stockholders. That by reason of the fact that ICT Insurance was insolvent all through its entire existence and that these defendants knew that ICT Insurance was insolvent, the Receiver here and now alleges that these defendants knew that such commissions received by them were trust funds and that a constructive trust was placed upon such commissions on insurance premiums of approximately $7,000,000.00 and such commissions on the sales of ICT Insurance stock of approximately $3,000,000.00 were taken and received by such defendants. That through such dishonest and fraudulent acts of taking such commissions knowing that ICT Insurance was insolvent and such funds were trust funds, JACCO of Texas, Ben Jack Cage, Nile E. Ball and John G. Vaughan converted, misappropriated and embezzled for their own use and benefit assets of ICT Insurance in such amount of approximately $10,000,000.00. That by reason of the illegal and fraudulent acts of all the other defendants hereinbefore alleged who aided and abetted these defendants in keeping ICT Insurance operating in violation of law through the fictitious loan transactions and the financial manipulations engaged in to create assets and hide the liabilities of ICT Insurance and through negligence of the officers and directors, all of such defendants joined, aided, abetted and made possible such conversion and misappropriation of ICT Insurance Company's trust funds in the approximate amount of $10,000,000.00.

307.

As hereinbefore alleged, in February 1955, 80,000 shares of stock and $212,000.00 of debenture bonds of Lone Star

[fol. 315] Boat Manufacturing Company, Inc., were transferred to Continental Union by way of Comercial and General Insurance Company of Tangier at the inflated and fictitious value of $2,459,790.91 in order to wipe out the $1,959,790.91 receivable from Comercial and General on the fictitious reinsurance transactions as between Comercial and General and Continental Union through which losses of ICT Insurance had been hidden, and further, in order to create fictitious assets in Continental Union. In February 1956, Lone Star Boat Manufacturing Company, Inc., was dissolved and the assets were sold to Standard Steel Works, Inc. In such transaction, Continental Union received $700,000.00 for the 80,000 shares of capital stock of Lone Star Boat Manufacturing Company and the $212,000.00 in debenture bonds of Lone Star Boat Manufacturing Company, Inc. Therefore, in such transaction, Continental Union sustained a loss on its books in the amount of $1,965,790.91. That by virtue of sustaining such loss, Continental Union on its books showed an insolvent financial condition. That in order to show in Continental Union's books that Continental Union was in a solvent financial condition in order that Continental Union could continue to allegedly carry ICT Insurance Company's reinsurance and thereby falsely show ICT Insurance solvent, a scheme was devised and entered into by James G. Cage, Nik Ez Bali, J. A. McFaddin, ICT Corp. and Continental Union whereby certain assets of ICT Corp. were temporarily transferred to Continental Union at a value of $2,417,436.00. The assets and the value placed on such assets that were transferred to Continental Union by ICT Corp. as of February 23, 1956 were as follows:

(a) Note due ICT Corp. by Standard Steel Works, Inc., dated February 8, 1956, due on or before 60 days from date with interest at 4 per cent in the amount of $573,178.51.

(b) Note due ICT Corp. by Standard Steel Works, Inc., dated February 8, 1956 in the amount of $286,589.26.

[fol. 316] (c) Lone Star Boat Manufacturing Company, Inc., debenture bond, at a value of $100,000.00.

(d) Note due ICT Corp. by A.R.A. Manufacturing Company dated August 31, 1955, plus accrued interest, in the amount of $295,023.93.

(e) Note due ICT Corp. by A.R.A. Manufacturing Company dated October 31, 1955, plus accrued interest, in the amount of $428,733.12.

(f) Partner's Finance Company stock at a value of $733,871.27. That in exchange for such assets with such stated value of $2,417,436.00, Continental Union executed its so-called surplus note payable to ICT Corp. on April 1, 1957. That in connection with such transaction, and in order to falsely represent that Continental Union was in a solvent financial condition, such assets transferred to Continental Union by ICT Corp. in the amount of $2,417,436.00 were set up in Continental Union's books and records as assets owned by Continental Union in such amount; however, the note executed by Continental Union to ICT Corp. was not set up as a liability in such amount of $2,417,436.00. That through such dishonest and fraudulent acts, these defendants aboved-named caused Continental Union's books to falsely show that Continental Union was in a solvent condition in order that Continental Union could continue to allegedly carry ICT Insurance Company's reinsurance and thereby aid ICT Insurance in falsely representing in its books and records through such reinsurance contracts as between ICT Insurance and Continental Union that ICT Insurance was in a solvent financial condition. That by virtue of such dishonest and fraudulent acts, James G. Cage breached his fiduciary duty to ICT Insurance and the defendants, Nile E. Ball, J. A. McFaddin, Ben Jack Cage, ICT Corp. and Continental Union joined, aided and abetted in such breach of fiduciary duty to ICT Insurance and all of such defendants, by virtue of such fraudulent acts aided, abetted and furthered the conspiracy to keep ICT Insurance operating in violation of law.

[fol. 317] 308.

As hereinbefore alleged, from and after February 1, 1955, Continental Union continued to carry ICT Insur-

ance Company's reinsurance for its own account. The treaties as between ICT Insurance and Continental Union were cancelled on June 19, 1956, effective midnight May 31, 1956, at which time, Continental Union owed ICT Insurance $1,902,218.58. To further carry out the scheme that was commenced in July 1955 as hereinbefore alleged, to transfer the assets out of ICT Insurance, to make ICT Corp. whole in anticipation of ICT Insurance going into receivership, a further scheme was devised and carried out by James G. Cage, Nile E. Ball, J. A. McFaddin, John G. Vaughan, Ben Jack Cage, ICT Corp., Continental Union, JACCO of Texas and JACCO of Alabama, whereby in a series of agreements dated July 1, 1956, practically all the assets of JACCO of Texas and practically all the assets of Continental Union of any value were transferred to ICT Corp., and ICT Insurance was caused to accept worthless mortgages of Chapman College in the amount of $581,900.00 and to forgive Continental Union an indebtedness of $1,320,318.58 in order to allegedly wipe out the receivable due from Continental Union to ICT Insurance in the amount of $1,902,218.58.

309.

This scheme was carried out by such defendants on July 1, 1956, by the execution of a series of settlement agreements. That by virtue of such fraudulent acts, these defendants hereinabove named caused ICT Insurance a loss in such amount of $1,902,218.58, for which loss the Receiver herein sues such defendants to recover.

310.

That as hereinabove shown, in connection with the can- [fol. 318] cellation of the reinsurance treaty as between ICT Insurance and Continental Union, Continental Union owed ICT Insurance $1,902,218.58 and as here further shown as an alleged partial payment for such balance, Continental Union, on June 21, 1956, transferred to ICT Insurance worthless Chapman College mortgage bonds in the amount of $581,900.00, thus leaving a balance of $1,320,-

318.58 due from Continental Union to ICT Insurance. That as hereinabove shown, in connection with such settlement agreements of July 1, 1956, when ICT Insurance was caused to forgive Continental Union the receivable due from Continental Union to ICT Insurance of $1,320,318.58, such forgiveness transaction resulted in a loss in ICT Insurance Company's records and books in such amount of $1,320,318.58 and would have rendered ICT Insurance insolvent in their books and records. That in order to allegedly replace such loss and to show ICT Insurance in a solvent financial condition, a further scheme and devise was entered into by James G. Cage and other officers and directors of ICT Insurance Company, whereby the value of the 892,000 shares of ICT Life that ICT Insurance owned was increased from $2.00 per share to $3.75 per share, or from a total of $1,764,000.00 to a total of $3,307,500.00, thereby increasing the value of such shares in the amount of $1,543,500.00 and thereby plugging up the hole left by reason of the forgiveness of the indebtedness from Continental Union to ICT Insurance of such amount of $1,320,318.58 in order to falsely show ICT Insurance in a solvent financial condition. That through such dishonest and fraudulent acts, these defendants as officers and/or directors, breached their fiduciary duties to ICT Insurance and aided, abetted and furthered the conspiracy to keep ICT Insurance operating in violation of law although ICT Insurance was hopelessly insolvent.

311.

As hereinbefore alleged, in March 1955, in order to create assets in Continental Union, a scheme was entered into by [fol. 319] Ben Jack Cage, Francis J. Knoll and others, whereby Continental Union allegedly paid over to Chapman College $675,000.00 and Continental Union executed its premium income notes to Chapman College in the amount of $1,575,000.00 in exchange for first mortgage notes of Chapman College in the amount of $2,250,000.00, which first mortgage notes of Chapman College, Continental Union set up in its records as an asset in such amount of $2,250,000.00, without setting up the liability of $1,575,-

000.00 under its premium income notes and thereby fictitiously creating assets in Continental Union in such amount of $1,575,000.00. On December 31, 1955, Continental Union transferred to ICT Insurance, Chapman College mortgages in the amount of $351,200.00 as an alleged payment on the reinsurance balance due from Continental Union to ICT Insurance, and on June 21, 1956, Continental Union transferred to ICT Insurance, Chapman College mortgages in the amount of $581,900.00 as an alleged payment on reinsurance balances due from Continental Union to ICT Insurance, making a total of Chapman College first mortgage bonds carried by ICT Insurance in the amount of $937,100.00. As hereinbefore further alleged in connection with such transaction, ICT Insurance was fraudulently caused to guarantee the payment by Continental Union of the $1,575,000.00 premium income notes executed by Continental Union to Chapman College in connection with such transaction. Some time prior to July, 1956, Chapman College officials began doubting the ability of Continental Union to pay its premium income notes. Some time in August 1956, Chapman College officials made a trip to Dallas and made demand on James G. Cage and others that the Chapman College bonds held by ICT Insurance be returned to Chapman College on the grounds that the premium notes of Continental Union were supposed to have been paid out of a sinking fund created from premium income and no sinking fund had been created by Continental Union for such payment, and further, that Chapman College was fearful that Continental Union was not able to meet the payments under its premium income certificates. Chapman College further contended that ICT Insurance was liable under its guarantee agreement and that Chapman College was threatening litigation to have the Chapman [fol. 320] College mortgage notes cancelled.

312.

That in order to cancel the $937,100.00 of Chapman College First Mortgage Notes held by ICT Insurance by returning them to Chapman College, a scheme was entered into and carried out by James G. Cage, Frank G. Newman,

Charles D. Dunne, James E. Dunne, II, T. K. Irwin, Sr., Ben Jack Cage, Continental Union, Clyde E. Belin, General Development Corporation and Beneficial Guaranty Life Insurance Company of Montgomery, Alabama, to exchange the Chapman College First Mortgage Notes held by ICT Insurance in such amount of $937,100.00 for Belin Memorial University First Mortgage Bonds in the amount of $735,000.00 and St. Michael's College Foundation, Inc., Debenture Bonds in the amount of $202,000.00.

313.

In connection with the Belin University First Mortgage Bonds in the amount of $735,000.00 that were to be substituted in part for the Chapman College First Mortgage Notes held by ICT Insurance in the amount of $937,100.00, such Belin Memorial University First Mortgage Bonds were issued in the following manner: In September 1955, T. K. Irwin, Sr. entered into an agreement with Allen Moore, III, trustee, whereby in such agreement and amendments thereto, the Moore family agreed to transfer to T. K. Irwin, Sr. certain business college property located in Chillicothe, Missouri, for a consideration of $288,500.00 to be paid by T. K. Irwin, Sr. to the Moore family. This consideration in such agreement and amendments thereto to be paid by T. K. Irwin, Sr., to the Moore family in such amount of $288,500.00 consisted of a first mortgage on the 187 lots in the Redbird Addition, Dallas County, Texas, at the value of $280,000.00 plus a mortgage on lot 26, block 20, of Redbird Addition at the value of $2,500.00 and 60,000 shares of Home Service Casualty Company stock at the value of $6,000.00.

[fol. 321] 314.

Clyde Belin was operating a college in St. Louis, Missouri, known as Belin Memorial University. A transaction was entered into as between T. K. Irwin, Sr., Charles D. Dunne, General Development Corporation, a Texas corporation controlled by T. K. Irwin, Sr., and Beneficial Guaranty Life Insurance Company, an insurance company

controlled by Charles D. Dunne for the purchase of the Chillicothe property by Belin Memorial University. Through a series of transactions, Belin Memorial University was caused to purchase the Chillicothe property. In such transactions, Belin Memorial University executed its First Mortgage Bonds in the total amount of $1,650,000.00, which bonds were allegedly backed up by a mortgage indenture on the St. Louis property owned by Belin Memorial University and the Chillicothe property acquired from the Moore family through T. K. Irwin, Sr. and General Development Corporation. As additional consideration to Belin Memorial University, a $60,000.00 mortgage was paid off by T. K. Irwin, Sr. and Beneficial Guaranty Life Insurance Company on property owned by Belin Memorial University in St. Louis, Missouri, which property was included in such mortgage indenture and a $10,000.00 cash payment to Belin Memorial University. Therefore, in such transaction, Belin Memorial University issued its $1,650,000.00 worth of First Mortgage Bonds to T. K. Irwin, Sr., Charles D. Dunne and Beneficial Guaranty Life Insurance Company and as consideration therefor only received the Chillicothe property at the value of $288,500.00, the $60,000.00 payment of a mortgage against its property in St. Louis, Missouri, and $10,000.00 cash, or a total consideration of $358,500.00. That to back up such First Mortgage Bonds of Belin Memorial University, the Chillicothe property and the St. Louis property were appraised at an alleged total value of $2,480,341.00. The First Mortgage Bonds of Belin Memorial University provided for interest [fol. 322] payments of 4 per cent per year and had attached thereto the interest coupons. That at the time that the $1,650,000.00 of Belin Memorial University Bonds were issued to T. K. Irwin, Sr., Charles D. Dunne and Beneficial Guaranty Life Insurance Company for only the consideration of $358,500.00, and at the time that such appraisal in the amount of $2,480,341.00 was obtained to allegedly back up such bonds, T. K. Irwin, Sr., Charles D. Dunne, James D. Dunne, Clyde E. Belin, Frank G. Newman and Beneficial Guaranty Life Insurance Company knew that such appraisal was false and that such Chillicothe property and St. Louis property upon which such bonds were issued was

not worth more than approximately $500,000.00. Furthermore, at such time, these defendants knew that Belin Memorial University could not meet the 4 per cent interest due and payable on December 15th of each year and could not retire such mortgages under the provision of the mortgage indenture and bonds and knew that such bonds were worthless. Thereafter, Charles D. Dunne, Beneficial Guaranty Life Insurance Company and T. K. Irwin, Sr. sold such bonds of Belin Memorial University at their par value and as hereinabove alleged, and as hereinafter will be further alleged, caused ICT Insurance to acquire $735,000.00 of such worthless bonds at their par value.

315.

As hereinbefore alleged, the Belin Bonds in the amount of $735,000.00, together with Debenture Bonds of St. Michael's College Foundation, Inc., in the amount of $202,000.00 were to be exchanged with ICT Insurance for the retirement of the Chapman College First Mortgage Bonds in the amount of $937,100.00 held by ICT Insurance. The St. Michael's College Foundation, Inc., is a corporation located in Santa Fe, New Mexico, which corporation has as [fol. 323] its objects and purposes the creation, maintenance and administration of an endowment fund for the benefit of St. Michael's College located in Santa Fe, New Mexico. Such St. Michael's Debenture Bonds were not an admissible asset in ICT Insurance under Article 2:10 of the Insurance Code and furthermore, St. Michael's College Foundation, Inc., did not have sufficient assets to back up such bonds and they were therefore not admissible assets in ICT Insurance.

316.

On about the 24th day of September 1956, the scheme to exchange the $937,100.00 of Chapman College First Mortgage Bonds held by ICT Insurance for the Belin Memorial University First Mortgage Bonds in the amount of $735,000.00 and the St. Michael's College Foundation, Inc., Debenture Bonds in the amount of $202,000.00 was carried out in the following manner:

(1) Paul J. Bleakley transferred to Chapman College $225,000.00 of St. Michael's College Foundation, Inc., Debenture Bonds which he then held and $280,000.00 of St. Michael's First Mortgage Bonds which he then held and T. K. Irwin, Sr. as trustee transferred to Chapman College $695,000.00 of Belin Memorial University Bonds which he held.

(2) Chapman College transferred to ICT Insurance $735,000.00 of Belin Memorial University Bonds and surrendered to ICT Insurance all of the then outstanding alleged surety bonds which had been previously executed by JACCO of Alabama as principal and ICT Insurance as surety to Chapman College to guarantee the payment to Chapman College of the $1,575,000.00 of premium income notes that had been executed by Continental Union to Chapman College in exchange for the $2,250,000.00 First Mortgage Bonds of Chapman College. As a part of this transaction, Chapman College also transferred to ICT Insurance $202,000.00 of St. Michael's College Foundation, [fol. 324] Inc., Debenture Bonds.

(3) For the $735,000.00 of Belin Memorial University Bonds and the $202,000.00 St. Michael's College Foundation, Inc., Debenture Bonds that ICT Insurance received from Chapman College, ICT Insurance was caused to transfer to Chapman College the $937,100.00 of Chapman College First Mortgage Bonds held by ICT Insurance.

(4) Chapman College then transferred to Paul J. Bleakley $545,120.00 worth of the premium income notes of Continental Union that it had originally received from Continental Union in exchange for the $225,000.00 worth of St. Michael's Debentures and the $280,000.00 of St. Michael's First Mortgage Bonds that Bleakley had transferred to Chapman College as hereinabove alleged. Chapman College also transferred to T. K. Irwin, Sr. $714,880.00 in premium notes of Continental Union that Chapman College had originally received from Continental Union in exchange for the Chapman College Mortgages transferred to Continental Union in the original transaction in 1955 in exchange for Irwin transferring the $695,000.00 Belin Bonds to Chapman, as hereinbefore alleged.

(5) At this time, ICT Corp. was holding $50,000.00 of Chapman College Mortgages to Chapman College in return for $20,000.00 worth of the St. Michael's Debenture Bonds and $30,000.00 worth of the St. Michael's Mortgage Bonds that Bleakley had transferred to Chapman College as hereinbefore alleged.

(6) T. K. Irwin, Sr. as trustee then transferred the $714,880.00 worth of premium income notes of Continental Union that he had received from Chapman College as hereinbefore alleged, to North American Development Corporation, a Ben Jack Cage-controlled entity. In exchange, T. K. Irwin, Sr. received from North American Development Corporation, $4,000.00 in cash plus four promissory [fol. 325] notes of North American Development Corporation, payable to T. K. Irwin, Sr. in the aggregate amount of $160,000.00 and at the same time, North American Development Corporation paid T. K. Irwin, Sr. an alleged attorney's fee in the amount of $25,000.00. The $714,880.00 of premium income notes of Continental Union that North American Development Corporation received in such exchange were then pledged by North American Development Corporation to T. K. Irwin, Sr. to secure the four promissory notes of North American Development Corporation to T. K. Irwin, Sr., in the aggregate amount of $160,000.00.

(7) Paul J. Bleakley then took the $545,120.00 of premium income notes of Continental Union that he had received from Chapman College in exchange for the $225,000.00 Debenture Bonds of St. Michael's College Foundation, Inc. and the $280,000.00 Mortgage Bonds of St. Michael's College Foundation, Inc. and then traded such premium income notes of Continental Union in such amount of $545,120.00 to Ben Jack Cage for 47,773 shares of the capital stock of Continental Union.

317.

That in connection with such exchange of the Chapman College Bonds by ICT Insurance for the Belin Bonds and St. Michael's Bonds by reason of the fact that Belin Memorial University could not make the interest payments of 4 per cent due and payable on December 15th of each year

on such bonds, upon the delivery of such bonds to ICT Insurance such interest coupons for a period of five years were clipped from such bonds and returned to Belin Memorial University. At the time that such Belin Memorial University Bonds in the amount of $735,000.00 and St. Michael's College Foundation, Inc., Debenture Bonds in the amount of $202,000.00, were exchanged for the $937,100.00 Chapman College First Mortgage Bonds held by ICT, James G. Cage, Frank G. Newman, Charles D. Dunne, James E. Dunne, II, T. K. Irwin, Sr., Ben Jack Cage, Con-[fol. 326] tinental Union, Clyde E. Belin, General Development Corporation and Beneficial Guaranty Life Insurance Company knew that the Belin Bonds and the St. Michael's College Foundation, Inc., Bonds were not admissible assets of ICT Insurance and/or were worthless. The effect of such transaction was to exchange worthless paper for worthless paper in order to continue to represent that ICT Insurance had assets in the amount of $937,000.00 in its records and books and thereby show ICT Insurance in an alleged solvent financial condition in order that ICT Insurance could continue to operate and sell its worthless policies and capital stock although ICT Insurance was hopelessly insolvent. That by reason of such dishonest and fraudulent acts, the above-named defendants who were officers and/or directors breached their duty to ICT Insurance and such other defendants joined, aided, furthered and abetted such officers in the breach of their fiduciary duty and all of such defendants aided, abetted and furthered the conspiracy in keeping ICT operating in violation of law although ICT Insurance was hopelessly insolvent.

318.

Another examination was made of the affairs of ICT Insurance as of September 30, 1956. This examination was a convention examination. Charles T. Ramsey, representing the Texas Insurance Department, was the Examiner in Charge, and assisting him in such convention examination, was E. E. Fuller representing the State of Georgia and Zone 3 of the National Association of Insurance Commissioners and Thomas Tutty, representing the State of Mon-

tana and Zone 6 of the National Association of Insurance Commissioners. Such examination was concluded and filed with the Board on the 11th day of February 1957. In the meantime, Garland A. Smith had been relieved of his duties as a member of the Board of Insurance Commissioners and J. Byron Saunders had resigned as Chairman of the Board on December 31, 1956. In such examination report the Board of Insurance Commissioners on February 11, 1957, such examination report showed ICT Insurance to be insolvent to the extent of $4,460,243.17. Based upon such examination report, on February 19, 1957, ICT Insurance was placed in receivership in the 98th District Court, Travis County, Texas.

[fol. 327] 319.

As hereinbefore alleged, as a part of the overall conspiracy, stock of ICT Insurance was sold outright and on an installment basis in the total amount of $9,585,752.94 in order to further the conspiracy by obtaining operating cash and creating surplus in order to keep ICT Insurance operating in violation of law, although all during the time such stock was sold, ICT Insurance was insolvent. All during the time that such stock was sold, all of the officers and directors either knew that ICT Insurance Company was insolvent and such stock was worthless, or as officers and directors they were charged with knowledge of such fact, or were negligent and careless in failing to ascertain the fact that ICT Insurance was insolvent and such stock was worthless. Furthermore, the defendants, as hereinbefore alleged, who joined, aided, and abetted in the creation of the fictitious assets and the hiding and concealment of ICT Insurance Company's liabilities, joined, aided, and abetted in creating a false picture of solvency of ICT Insurance, and joined, aided, and abetted in the sale of such worthless stock of ICT Insurance; all of which acts were a fraud against ICT Insurance and its stockholders and stock subscribers and aided, abetted, and furthered the conspiracy, and which acts were the proximate cause of the loss to ICT Insurance Company and its stockholders and stock subscribers in such amount of $9,585,752.94, which loss the Receiver herein sues to recover.

320.

In the alternative, the Receiver alleges that the sale of the stock of ICT Insurance was done through the use of the U.S. mails in violation of Section 77 (L) (2), Title 15, U.S.C., commonly known as the Federal Securities Act, 1953.

321.

The officers and/or directors of ICT Insurance hereinabove named when such stock was authorized to be sold, issued, sold, or aided in the sale of such securities or [fol. 328] controlled the sale of such securities through their agents and representatives. That each of the purchasers of such stock were induced to purchase such stock because they were deceived as to the true facts and misrepresentations were made by these officers and/or directors, and agents, brokers, salesmen, or employees and other persons acting in consort with them as hereinbefore alleged; that in the sale of such securities, the U.S. mails were used in transmitting untrue statements of material fact or omitting to state a material fact necessary in order to make the statement in the light of the surrounding circumstances under which they were made, not misleading.

322.

In the sale of such stock, the Receiver alleges that these purchasers of such stock were deceived by the following written communications or representations by these defendants or their agents, representatives and employees, some or all of which written communications or representations were made through the means of U.S. mail.

(A) The financial pamphlet statements of ICT Insurance which were made in pamphlet form to show the financial condition of ICT Insurance Company as of December 31, 1951, December 31, 1952, December 31, 1953, December 31, 1954, and December 31, 1955 as hereinbefore alleged, were mailed to and exhibited to the purchasers of the stock of ICT Insurance Company to induce them to purchase stock, which statements as hereinbefore shown were false.

(B) The financial statements obtained from the Dunne's Insurance Reports which were made to show the financial condition of ICT Insurance Company as of December 31, 1953 and December 31, 1954, were submitted to and exhibited to the purchasers of the stock of ICT Insurance Company through the use of the U.S. mails to induce them to purchase stock of ICT Insurance Company, which financial pamphlets as hereinbefore shown were false.

[fol. 329] (C) The Stock Certificates of ICT Insurance Company were submitted to and delivered to such purchasers of ICT Insurance Company stock through the U.S. mails which purportedly on their face showed that such Stock Certificates were worth the value stated thereon, which statement that such stock was worth such value was false because, as hereinbefore shown, all through its existence ICT Insurance Company was insolvent and such stock was worthless.

(D) The stock subscriptions under which the purchasers of such stock of ICT Insurance Company purchased the stock of ICT Insurance Company on an installment basis were transmitted through the use of the U.S. mails and the statements on such subscription contracts stating that such stock was worth the value therein stated were false for the reason that as hereinbefore shown, ICT Insurance was insolvent all through its existence and such stock was worthless.

(E) Other and various false reports and statements as to ICT Insurance Company's financial condition and operating condition were transmitted and delivered to the purchasers of the stock of ICT Insurance Company through the use of the U.S. mails.

323.

Each of the defendants hereinbefore named who were officers and/or directors of ICT Insurance at the time of the sale of such stock of ICT Insurance Company were in control of the sale of such stock by reason of the official position that they held. All of such defendants knew and/or were charged with knowledge and/or were negligent and

careless, when with ordinary care, they could have ascertained the facts and had reasonable grounds to believe and know that the financial condition of ICT Insurance was being falsely represented in the sale of such stock. All of such defendants knew and/or are charged with knowledge [fol. 330] that such securities were being sold and such false and misleading statements were being made by the use of the U.S. mails. Because of their position of being in control of such securities and their consort of action in approving, issuing, and selling such securities, their acts constituted a conspiracy to violate the Securities Act in the sale of these worthless securities to such purchasers. Because of the wrongful, illegal, and fraudulent acts of the co-conspirators hereinbefore named, who as hereinbefore alleged, aided and abetted such officers and directors in the fraudulent financial manipulations of ICT Insurance Company in order to create assets and hide and conceal liabilities of ICT Insurance, they knew such financial manipulations would be the basis for falsely representing the financial condition of ICT Insurance in financial statements and such statements would be used in the sale of the stock of ICT Insurance Company, and through such acts, joined, aided, and abetted the conspiracy to violate the Federal Securities Act.

324.

Such illegal acts of these defendants in violation of the Federal Securities Act in the sale of these worthless securities to the stock purchasers of ICT Insurance Company was a proximate result of the loss suffered by such purchasers in the amount of $9,585,752.94, and the Receiver herein in his representative capacity on behalf of ICT Insurance Company and such purchasers, sues to recover such losses.

325.

That further, the Receiver alleges that by reason of, as hereinbefore alleged, the misapplication of corporate funds, negligence, or gross neglect or inattention to their official duties, mismanagement, maladministration, breaches of

trust, malfeasance, misfeasance, non-feasance, waste, dissipation of monies and property committed to their care in a fiduciary relationship tantamount to trusteeship, trans- [fol. 331] gressions, delinquencies, circumventions, dishonest and flagrant systematic disregard over a long period of time of their duties, the hereinabove-named defendants, who were officers and/or directors of ICT Insurance Company and the other parties as hereinbefore alleged who joined, aided, and abetted such officers and/or directors in violation of such duties are liable to the Receiver in his representative capacity for all losses suffered by ICT Insurance Company and the policyholders, creditors, claimants, stockholders, and stock subscribers in the total amount of $15,000,000.00, all of which acts were a direct and proximate result of such losses and which loss the Receiver herein sues to recover.

326.

That further, the Receiver alleges that all of the wrongful, fraudulent, unlawful and dishonest acts performed and done by each and every person and corporation as hereinbefore named and specifically detailed were done and committed in furtherance of a common agreement, scheme, and conspiracy existing between all of such persons and corporations. This common purpose, design, and conspiracy was intended to deceive, defraud, and cheat ICT Insurance and its innocent policyholders, stockholders, claimants, and creditors. In the sale of each and every insurance policy that ICT Insurance Company was caused to sell during ICT Insurance Company's existence, the conspirators falsely represented and joined, aided, and abetted in falsely representing that ICT Insurance Company was sound and in a solvent condition and had complied with the insurance laws of the State of Texas and was able to and would pay the losses and claims of policyholders and third parties which might be suffered under such policies. Likewise, the conspirators purported to defraud ICT Insurance Company and its creditors by representing to the public and to prospective creditors in particular that ICT Insurance Company was safe, sound, and in a solvent financial condition

[fol. 332] and was able to pay its debts. Through the combined efforts of all of the defendants hereinbefore named who participated in such conspiracy, it was made possible for these defendants to effectuate and carry out their purpose by entering into and carrying out these fraudulent, illegal, and wrongful financial manipulations. Each and every one of such defendants aided, abetted, furthered, and gave assistance to the conspiracy. It was the duty of all of the officers and/or directors of ICT Insurance Company who had knowledge of the true financial condition, or who in the exercise of reasonable diligence should have known the true financial condition of ICT Insurance Company to have revealed this condition in the annual statements filed with the Board of Insurance Commissioners, and in the other financial pamphlets and statements that were published and distributed, and to have revealed this condition openly and honestly each time a policy of insurance was sold, stock was sold, or a debt was incurred. In violation of this duty owed to ICT Insurance Company and its policyholders, claimants, creditors, and stockholders, the officers and/or directors of ICT Insurance Company hereinbefore named who either had knowledge of the Company's financial condition or were charged with knowledge of such condition, and the other defendants hereinbefore named who joined, aided, and abetted in the conspiracy, never at any time volunteered the information that such companies were insolvent; but at all times, such persons fraudulently concealed and covered up this important and material fact. All of the acts done and the representations made by these conspirators, hereinbefore specifically detailed, did in fact effectuate, accomplish and carry out the unlawful purpose, design, and the intent of the conspiracy. Each and every creditor except defendants who may be creditors of ICT Insurance Company allowed their debt to be incurred by relying upn the false representations made to them that ICT Insurance Company was safe and sound with which to do business. Each and every policyholder who purchased, received, or accepted a policy of [fol. 333] ICT Insurance Company did so in reliance upon the representations made to them that ICT Insurance Company was safe and solvent, had complied with the laws of

the State of Texas and was able to pay its debts and losses. All of the stockholders and stock subscribers who purchased the stock of ICT Insurance Company, other than the defendants, did so upon the representations made to them that ICT Insurance Company was safe and solvent, had complied with the laws of the State of Texas, and that such investments were sound investments and such investors would make a profit on their investment.. All of the representations made by the officers and/or directors and their agents and representatives were made either directly to the claimants, creditors, policyholders, and stockholders of ICT Insurance Company who relied thereon or were made directly to the class of persons to which such claimants, creditors, policyholders, and stockholders belonged with the intent that such representations would be relied upon by these particular persons to which the said representations were made. These misrepresentations were in fact relied upon either by the policyholders, creditors, and claimants to whom they were directly made or by such persons within the class to which such representations were made. Through all of the fraudulent acts, concealments, and misrepresentations hereinbefore alleged, ICT Insurance Company was caused to incur debts and obligations to such claimants, creditors, stockholders and policyholders, which debts and obligations ICT Insurance Company could not fulfill. By reason of such fraudulent acts and misrepresentations committed in furtherance of and in aid of the conspiracy, ICT Insurance and its claimants, creditors, stockholders, and policyholders suffered a loss in the amount of $15,000,000.00 as a direct and proximate result of such fraudulent acts and misrepresentations, which loss the Receiver herein sues to recover.

[fol. 334] 327.

The Receiver alleges that each defendant herein charged with conspiracy, with each of the other defendants so charged, is liable for each and every statement, act, or transaction of each other co-conspirator during the period from the inception of the conspiracy in 1950 until its completion in 1957, regardless of when each defendant aided, abetted, and furthered the conspiracy and became a party

thereto, and in this connection, Plaintiff alleges that none of the Defendants herein charged as conspirators ever, at any time after their entries into the conspiracy withdrew from the conspiracy. Plaintiff alleges that the facts hereinbefore set forth amounted in law to a conspiracy to defraud ICT Insurance and its claimants, creditors, policyholders, and stockholders in the sum of $15,000,000.00, all of which parties are represented by the Receiver herein in his representative capacity.

328.

During the time that ICT Insurance was doing business between September 28, 1951, through February 19, 1957, the Fidelity and Deposit Company of Maryland, Baltimore, Maryland, in consideration of premiums paid to such company by ICT Insurance were bound by Fidelity Bonds Numbers 29 27 560, 29 27 560a, and 29 27 560b, by the terms of which the Fidelity and Deposit Company of Maryland promised and agreed and bound itself to indemnify ICT Insurance for all losses through any dishonest and fraudulent acts of any of the employees of ICT Insurance up to $100,000.00.

329.

ICT Insurance and its claimants, creditors, stockholders, and policyholders, all of which are represented by the Receiver, suffered direct and immediate loss, through the dishonest and wrongful acts of Ben Jack Cage, Nile E. Ball, James G. Cage, John G. Vaughan, Francis J. Knoll, and others acting in collusion with such individuals as herein- [fol. 335] before detailed during the period of time such Bonds were in force in the specific amount alleged before in this Petition; all of which losses were covered by the above Bonds of the Fidelity and Deposit Company of Maryland. By reason of such false, dishonest, and fraudulent acts of such employees as heretofore enumerated and detailed, they furthered, aided, and abetted the conspiracy to defraud ICT Insurance and its claimants, creditors, policyholders, and stockholders, which acts directly and proximately resulted in a loss to ICT Insurance in the total

amount of $15,000,000.00, which loss came within the terms of such bonds, and by reason of such fact, the Fidelity and Deposit Company of Maryland as well as such defendants are jointly and severally liable to the Receiver, the full amount of such bonds being the sum of $100,000.00.

330.

The specific terms of the bonds enumerated above are well known to the defendant Fidelity and Deposit Company of Maryland, Baltimore, Maryland. The Receiver has complied with all conditions precedent to recover from the Fidelity and Deposit Company of Maryland on such bonds. Although demand has been made upon such company, it has failed and refused to pay the face amount of such bonds or any portion thereof to the Receiver.

331.

The following companies issued the following Fidelity Bonds to Garland A. Smith and J. Byron Saunders, which bonds were issued to such defendants under the requirements of the Texas Insurance Code:

(a) On the 1st day of April 1952, the National Surety Corporation, New York, issued its bond to Garland A. Smith, and on the 10th day of February 1953, the National Surety Corporation, New York, issued its bond to Garland A. Smith, in the principal amounts of $5,000.00 each, condition that Garland A. Smith shall faithfully discharge the [fol. 336] duties of his office as Casualty Insurance Commissioner of the State of Texas. On October 9, 1953, American General Insurance Company, Houston, Texas, issued its bond to Garland A. Smith, condition that Garland A. Smith shall well and faithfully perform all the duties of his office as Life Insurance Commissioner and Chairman of the Board of Insurance Commissioners as required by law in the principal amount of $5,000.00.

(b) On the 9th day of October 1953, the National Surety Corporation, New York, issued its bond to J. Byron Saunders, condition that J. Byron Saunders shall faithfully discharge the duties of his office as Casualty Insurance

Commissioner of the State of Texas in the principal amount of $5,000.00.

332.

As hereinbefore alleged, ICT Insurance and its claimants, creditors, stockholders, and policyholders suffered direct and immediate losses through the wrongful acts of Garland A. Smith and J. Byron Saunders, all of which fraudulent and dishonest acts were in violation of their bonds. All of such dishonest, false, fraudulent, wrongful, and illegal acts of Garland A. Smith and J. Byron Saunders as hereinbefore alleged, aided, abetted, and furthered the conspiracy, and were a part thereof to defraud ICT Insurance and its claimants, creditors, policyholders, stockholders, and the public, and directly and proximately resulted in the loss to ICT Insurance of $15,000,000.00, which losses come under the terms of the National Surety Corporation and American General Insurance Company bonds issued to Garland A. Smith and the National Surety Corporation bond issued to J. Byron Saunders. By reason of such facts, the National Surety Corporation and the American General Insurance Company is liable to pay to the Receiver jointly and severally with Garland A. Smith the full face amount of such bonds totaling $10,000.00 and the National Surety Corporation is liable to pay to the Receiver jointly and severally with J. Byron Saunders the full face amount of its bond [fol. 337] totaling $5,000.00.

333.

The specific terms of the bonds enumerated above are well known to the defendants National Surety Corporation and American General Insurance Company and said companies are in possession of the exact copies of said bonds. The Receiver has complied with all conditions precedent to recover from National Surety Corporation and American General Insurance Company on such bonds.

Wherefore Premises Considered, Plaintiff prays the Court that the Defendants and each of them be cited to appear and answer this Petition and upon trial hereof, Plaintiff have judgment against the Defendants and each of them as follows:

(A) Against defendants Ben Jack Cage, J. Byron Saunders, Garland A. Smith, Nile E. Ball, Pierce P. Brooks, B. F. Biggers, Max Wayne Rychlik, Lester F. Hall, James E. Dunne, James G. Cage, J. A. McFaddin, Paul C. Sparks, Charles D. Dunne, James E. Dunne, II, Henry J. Stites, Francis J. Knoll, Stuart B. Hopps, T. K. Irwin, Sr., J. N. Fisher, John G. Vaughan, Clyde E. Belin, Edmund B. Welshans, W. Leslie Miller, C. R. Saunders, L. A. Townsend, Walter Wideman, Ray Johnson, Bill Sams, George Webber, T. W. Wheeler, Stanley E. Prichard, C. C. Hill, Charlotte Morgan Graham, W. A. Combs, William V. Barker, Albert Boggess, F. E. MacCurdy, John B. Mills, C. A. Mohrle, C. D. Mohrle, Cecil Mills, Richard Dean Hawn, Frank G. Newman, W. J. Noad, Marcus Loftis, Kenneth Mabry, J. A. McMahon, Jr., P. C. Klein, Vernon Evans, Walton N. Newman, Frank Owens, Claude Ritchie, Ed Weimar, C. O. Blackburn, Walter Monroe, L. "Bud" Laird, Arthur Noble, Gaines R. Terrell, Doris Baker, Charles Jones, W. L. [fol. 338] Pickens, Frank Yeager, Steve Booke, Robert F. Fly, J. H. Abright, E. C. Gones, C. L. Wisseman, Carl Knight, James J. Brophy, John P. Moran, Arthur M. Brown, Wm. Ross Kennedy, A. B. Dupuy, L. W. Kellogg, J. K. Leaman, O. Z. Gulledge, Marshall Bivens, Robert F. Talbott, William J. Harris, Freeman Everett, William A. Cullen, W. S. East, E. A. McSpadden, Eddie Gross, Fred Lucas, W. C. McMasters, Arthur B. Eaton, E. B. Kelley, R. L. Ferguson, Harry J. Aden, Mercantile National Bank at Dallas, Republic National Bank of Dallas, Jack Cage and Company, Inc., (Alabama); Jack Cage and Company, Inc. (Texas); Continental Union Insurance Company, Continental Union Life Insurance Company, Equitable Realty Corporation, Narragansett Insurance Company, Unitex Industries, Inc., Commercial and General Fire and Marine Insurance Company, The London & Edinburgh Insurance Company, Ltd., Guardian Insurance Company, Combined Investments, Inc., Triangle Research & Advertising, Inc., Oxford Corporation, Jack Cage & Company (Delaware), Bankers Bond Company, A.R.A. Manufacturing Company, Inc., Cumberland Apartment Company, Federal Underwriters, Compania General de Serguros La Comercial, Leadenhall Corporation, National Bankers Life Insurance

Company, All States Life Insurance Company, Missouri Union Insurance Company, Missouri Union Corporation, General Development Corporation, Beneficial Guaranty Life Insurance Company, Minster Insurance Company, Ltd., John C. Page & Company, Mendes & Mount, C. E. Heath & Company, Ltd., Harvey Trinder and Van Ommeren, Ltd., Lloyds of London and the Underwriters doing business at Lloyds of London, Midland Employers Mutual Assurance, Ltd., The Orion Insurance Company, Ltd., Drake Insurance Company, Ltd.; Sphere Insurance Company, Ltd., Insurance Corporation of Ireland, Ltd., Steadfast Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Sovereign Marine and General Insurance Company, Ltd., General Reinsurance Syndicate, Ltd., Progress Insurance Company, Ltd., United Benefit Fire [fol. 339] Insurance Company, Stewart Smith & Company, Andrew Weir Insurance Company, Ltd., English & American Insurance Company, Ltd., The Estate of Garth W. Daniel, deceased, The Estate of Joel H. Berry, deceased, and The Estate of J. M. West, deceased, jointly and severally, in the sum of $15,000,000.00 with legal interest from May 24, 1950, less any amounts reduced to judgment and collected against any of such defendants as prayed for hereinafter, to compensate ICT Insurance and its claimants, creditors, policyholders, and stockholders for the losses they suffered.

(B) 1. Against defendant Unitex Industries, Inc., for the return of the 80,000 shares of the common voting stock of A.R.A. Manufacturing Company, Inc., together with all dividends and income earned and received thereon from the date of September 21, 1955; that the Charter Amendment of Unitex Industries, Inc., of October 4, 1955, converting all of the outstanding common stock to voting stock be declared null and void and set aside and for the return to ICT Insurance of the 10,000 shares of the voting stock of ICT Corp. that was wrongfully transferred out of ICT Insurance on September 21, 1955, together with all earnings, profits, and dividends on such stock from such date; for an injunction enjoining Unitex Industries, Inc., from disposing of the 80,000 shares of the common voting stock of the

A.R.A. Manufacturing Company and such 10,000 shares of the stock of Unitex Industries, Inc.

2. Against defendant Mercantile National Bank at Dallas in the sum of $200,233.34 with legal interest thereon from June 6, 1950; in the sum of $100,108.33 with legal interest thereon from January 10, 1951; in the sum of $151,250.49 with legal interest thereon from February 19, 1952; in the sum of $60,046.67 with legal interest thereon from January 7, 1952; in the sum of $150,548.61 with legal interest thereon from the date of April 4, 1952.

[fol. 340] 3. Against Ben Jack Cage, Stuart B. Hopps, John P. Moran, Arthur M. Brown, The Estate of Joel H. Berry, John B. Mills, C. A. Mohrle, C. D. Mohrle, Federal Underwriters, Cecil Mills, and Richard Dean Hawn, jointly and severally, in the sum of $432,500.00, with legal interest on the sum of $322,500.00 from November 28, 1950, and legal interest on the sum of $110,000.00 from December 26, 1951.

4. Against Ben Jack Cage, Francis J. Knoll, Nile E. Ball, John C. Vaughan, Stuart B. Hopps, Lloyds of London, The Orion Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Andrew Weir Insurance Company, Ltd., Steadfast Insurance Company, Ltd., English and American Insurance Company, Ltd., John C. Page and Company, C. E. Heath and Company, Ltd., Harvey Trinder & Van Ommeren, Ltd., and Mendes Mount, jointly and severally, in the sum of $178,051.34 with interest thereon from June 17, 1953.

5. Against Ben Jack Cage, Garland A. Smith and Max Wayne Rychlik, jointly and severally, in the sum of $18,548.00 with legal interest thereon from the dates of receipt of such amount.

6. Against the Republic National Bank of Dallas in the sum of $503,538.85 with legal interest thereon from September 23, 1952; in the sum of $930,015.44 with legal interest thereon from March 12, 1953; in the sum of $250,055.55 with legal interest thereon from January 2, 1953; in the sum of $504,402.75 with legal interest thereon from

February 28, 1954; in the sum of $400,088.88 with legal interest thereon from January 2, 1954; in the sum of $400,222.24 with legal interest thereon from January 5, 1955.

7. Against Ben Jack Cage, Frank G. Newman, Francis J. Knoll, J. N. Fisher, T. K. Irwin, Sr., and JACCO of Texas, jointly and severally, in the sum of $152,500.00 with legal interest thereon from June 22, 1954.

[fol. 341] 8. Against J. Byron Saunders and Ben Jack Cage, jointly and severally, in the sum of $7,948.00 with legal interest thereon from the dates such amount was received.

9. Against Lloyds of London, The London & Edinburgh Insurance Company, Ltd., Ben Jack Cage, and Francis J. Knoll, jointly and severally, in the sum of $17,500.00 with legal interest thereon from February 1, 1954.

10. Against Ben Jack Cage, Continental Union, JACCO of Alabama, and Leadenhall, jointly and severally, in the sum of $37,929.63 with legal interest thereon from November 13, 1953.

11. Against Ben Jack Cage, Francis J. Knoll, JACCO of Texas, La Comercial, Commercial and General, Leadenhall Corporation of Delaware, and Combined Investments, Inc., jointly and severally, in the amount of $217,048.10 with legal interest thereon from December 30, 1953.

12. Against Ben Jack Cage, Francis J. Knoll, La Comercial, Commercial and General, Combined Investments, Inc., Francis J. Knoll, Trustee, Triangle Research and Advertising, JACCO of Delaware, and JACCO of Texas, jointly and severally, in the sum of $416,084.07 with legal interest thereon from June 4, 1954.

13. Against Ben Jack Cage, Francis J. Knoll, and Continental Union jointly and severally in the sum of $242,312.10 with legal interest thereon from June 15, 1954.

14. Against Ben Jack Cage, Francis J. Knoll, Frank G. Newman, Henry J. Stites, Charles D. Dunne, James E. Dunne, II, JACCO of Texas, and the Bankers Bond Com-

pany, jointly and severally, in the sum of $232,000.00 with legal interest thereon from December 3, 1954.

15. Against A.R.A. Manufacturing Company in the sum of $81,000.00 and legal interest thereon from January 4, 1955.

[fol. 342] 16. Against Unitex Industries, Inc., JACCO of Texas, Ben Jack Cage, and Continental Union Life, jointly and severally, in the sum of $525,000.00 with legal interest thereon from January 4, 1955.

17. Against Lloyds of London, Minster Insurance Company, Ltd., Midland Employers Mutual Assurance, Ltd., The Orion Insurance Company, Ltd., Drake Insurance Company, Ltd., Sphere Insurance Company, Ltd., Insurance Corporation of Ireland, Ltd., Steadfast Insurance Company, Ltd., Seven Provinces Insurance Company, Ltd., Sovereign Marine & General Insurance Company, Ltd., General Reinsurance Syndicate, Ltd., Progress Insurance Company, Ltd., and John C. Page and Company, jointly and severally, in the sum of $17,718.95 with legal interest thereon from June 29, 1955.

18. Against Lloyds of London, The London and Edinburgh Insurance Company, Ltd., United Benefit Fire Insurance Company, and Stewart Smith and Company, jointly and severally, in the sum of $21,567.16 with legal interest thereon from June 29, 1955.

19. Against Ben Jack Cage, Nile E. Ball, JACCO of Texas, and the directors of ICT Insurance as of July 16, 1955, jointly and severally, in the amount of $977,632.52 with legal interest thereon from July 16, 1955.

20. Against Unitex Industries, Inc., Ben Jack Cage, Nile E. Ball, J. A. McFaddin, Pierce P. Brooks, National Bankers Life Insurance Company, JACCO of Alabama, Lester F. Hall, James G. Cage, and the directors of ICT Insurance as of July 16, 1955, and the directors of Unitex Industries, Inc., as of July 16, 1955, jointly and severally, in the sum of $3,000,000.00 with legal interest thereon from July 16, 1955.

21. Against Pierce P. Brooks, Ben Jack Cage, Nile E. Ball, Lester F. Hall, National Bankers Life Insurance Company, JACCO of Alabama and Unitex Industries, Inc., jointly and severally, in the sum of $1,864,515.94 with le-
[fol. 343] gal interest thereon from June 20, 1955.

22. Against Pierce P. Brooks as trustee of the two Pierce P. Brooks trusts in the Mercantile National Bank to enjoin such trustee from disposing of the assets belonging to ICT Insurance in such trust accounts.

23. Against Unitex Industries, Inc., James G. Cage, Nile E. Ball, J. A. McFaddin, John G. Vaughan, Ben Jack Cage, Continental Union, JACCO of Texas, and JACCO of Alabama, jointly and severally, in the sum of $1,902,218.58 with legal interest thereon from July 1, 1956.

24. Against Ben Jack Cage, James G. Cage, Francis J. Knoll, John G. Vaughan, Nile E. Ball, and the Fidelity and Deposit Company of Maryland, jointly and severally, in the sum of $100,000.00 with legal interest thereon.

25. Against J. Byron Saunders and the National Surety Corporation, jointly and severally, in the sum of $5,000.00, with legal interest thereon.

26. Against Garland A. Smith and the National Surety Corporation, jointly and severally, in the sum of $5,000.00 with legal interest thereon.

27. Against Garland A. Smith and the American General Insurance Company, jointly and severally, in the sum of $5,000.00 with legal interest thereon.

For such other relief, general and special, in law or in equity, to which Plaintiff may be entitled in this case.

Respectfully submitted

Cecil C. Rotsch, P. O. Box 13, Austin, Texas; Wilson & Curetón, 401-8 Professional Bldg., Waco, Texas, By Frank M. Wilson, Attorneys for Plaintiff.

[fol. 344]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

CLERK'S ENDORSEMENT RE FILING

(Endorsed) No. 110,917 (Being No. 110,917 and 112,113 Consolidated as No. 110,917. C. H. Langdeau, Receiver of ICT Insurance Company v. Ben Jack Cage, et al. In the 98th District Court of Travis County, Texas. Plaintiff's First Amended Original Petition in Cause No. 110,917 and Plaintiff's Original Petition in the Second Numbered Cause. (Consolidated as No. 110,917) Cecil C. Rotsch P.O. Box 13, Austin, Texas. Wilson & Cureton 401-8 Professional Bldg. Waco, Texas. Attorneys for Plaintiff. Filed in the 98th District Court of Travis County, Texas, at 10:00 A. M. July 21, 1958, O. T. Martin, Jr., District Clerk, By Geo. W. Bickler, Deputy.

[fol. 345]

IN THE DISTRICT COURT OF TRAVIS COUNTY
IN AND FOR THE 98TH JUDICIAL DISTRICT OF TEXAS

No. 110,917

(Being No. 110,917 and No. 112,113 Consolidated as No. 110,917)

C. H. LANGDEAU, Receiver of ICT INSURANCE COMPANY,
Plaintiff,

vs.

BEN JACK CAGE, et al., Defendants.

PLEA OF PRIVILEGE OF DEFENDANT MERCANTILE NATIONAL BANK AT DALLAS—Filed January 2, 1959

To Said Honorable Court:

Comes now Mercantile National Bank at Dallas, one of the defendants in the above entitled and numbered cause, having been heretofore served with citation to appear here-

in, and files this its plea of privilege, showing to the Court as grounds therefor the following:

1. Defendant Mercantile National Bank at Dallas, the party claiming such privilege, was not at the institution of such suit, nor at the time of service of process therein, nor is it at the time of the filing of this plea of privilege, a resident of Travis County, Texas, the county in which such suit was instituted; nor did this defendant at any time have its principal place of business or any place of business in said Travis County, Texas.

2. At the institution of such suit and at the time of service of process therein, the residence of defendant Mercantile National Bank at Dallas was the City of Dallas, Dallas County, Texas, and at the time of filing this plea of privilege the residence of defendant Mercantile National Bank at Dallas is the City of Dallas, Dallas County, Texas, and at such times its post office address was and is, respectively, Mercantile Bank Building, Dallas 22, Texas. In this connection, defendant Mercantile National Bank at Dallas says that at such times it was and is a national bank-[fol. 346] ing association organized and existing under the laws of the United States of America relating to national banks known as the National Bank Act, that under such laws it was established in the City of Dallas, Dallas County, Texas, that its principal place of business and only place of business is at its banking house in the City of Dallas, Dallas County, Texas, and that it had and has no other place of business other than its banking house in the City of Dallas, Dallas County, Texas.

3. No exception to exclusive venue in the county of one's residence insofar as defendant Mercantile National Bank at Dallas is concerned, provided by law, exists in said cause.

4. Defendant Mercantile National Bank at Dallas further says that it is a national banking association organized and existing under the laws of the United States of America known as the National Bank Act with its principal and only place of business in the City of Dallas, Dallas County, Texas, and that by the express provisions of the federal law under which defendant Mercantile National Bank at

Dallas was organized and exists (sic) actions and proceedings against defendant Mercantile National Bank at Dallas may be had only in a state, county or municipal court in the City of Dallas, Dallas County, Texas.

5. This defendant further says that plaintiff, Receiver of ICT Insurance Company, has the legal capacity and authority to sue only on causes of action which could have been maintained by ICT Insurance Company as of the date that such corporation was adjudicated insolvent and that plaintiff does not have the legal capacity and authority to maintain this action as representative of creditors, claimants, policyholders and stockholders of said ICT Insurance Company or as a representative of the public interests.

[fol. 347] Wherefore, premises considered, defendant Mercantile National Bank at Dallas prays the Court to sustain this its plea of privilege.

Hubert D. Johnson, Of Carrington, Johnson & Stephens, 1700 Mercantile Bank Building, Dallas 1, Texas; Charles D. Mathews, Of Looney, Clark, Mathews, Thomas & Harris, Brown Building, Austin, Texas, Attorneys for Defendant Mercantile National Bank at Dallas.

Duly sworn to by Hubert D. Jackson, jurat omitted in printing.

[fol. 348]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

CLERK'S ENDORSEMENT RE FILING

(Endorsed) No. 110,917 (Being No. 110,917 and 112,113 Consolidated as No. 110,917) In the District Court of Travis County in and for the 98th Judicial District of Texas. C. H. Langdeau, Receiver of ICT Insurance Company, Plaintiff vs. Ben Jack Cage, et al., Defendants. Plea of Privilege of Defendant Mercantile National Bank at Dallas. Filed in the 98th District Court of Travis County, Texas, at 2:30 P. M. Jan. 2, 1959, O.T. Martin, Jr., District Clerk.

[fol. 349]

IN THE 98TH DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

No. 110,917

(Being No. 110,917 and No. 112,113 consolidated as No. 110,917)

C. H. LANGDEAU, Receiver of I.C.T. INSURANCE COMPANY,

vs.

BEN JACK CAGE, et al.

PLEA OF PRIVILEGE OF THE DEFENDANT
REPUBLIC NATIONAL BANK OF DALLAS

Comes now Republic National Bank of Dallas, a defendant in the above styled and numbered cause, having been heretofore served with citation to appear and answer herein, and files this, its plea of privilege, showing to the court as grounds therefor the following:

(1) This defendant, the party claiming such privilege, was not at the institution of such suit, nor at the time of the service of process thereon, nor was, nor is, it at the time of the filing of such plea a resident of Travis County, Texas, the county in which such suit was instituted.

(2) The county of the residence and location of this defendant, a national bank organized under and existing by virtue of the laws of the United States, at the time of such plea, including the time of the filing of same, is Dallas County, Texas, as specified in the Organization Certificate of this defendant.

(3) No exception to exclusive venue in the county of one's residence provided by law, exists in said cause.

(4) Plaintiff C. H. Langdeau, Receiver of I.C.T. Insurance Company, has not the legal capacity to sue as a repre-

sentative of the creditors, claimants, policyholders and stockholders of the I.C.T. Insurance Company or any of them and as a representative of the public.

[fol. 350] (5) That the plaintiff C. H. Langdeau, Receiver of I.C.T. Insurance Company, is not entitled to recover in the capacity in which he sues, viz: "as representative of its (I.C.T. Insurance Company) creditors, claimants, policyholders, and stockholders or any of them."

(6) That the plaintiff C. H. Langdeau, Receiver of I.C.T. Insurance Company, is not entitled to recover in the capacity in which he sues, viz: "as a representative of the public interest."

Wherefore, Premises Considered, this defendant prays the court to sustain this its plea of privilege.

Republic National Bank of Dallas, By De Witt Ray
Vice President

Duly sworn to by De Witt Ray, jurat omitted in printing.

[fol. 351]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

MOTION TO DISMISS BY REPUBLIC NATIONAL BANK OF DALLAS

Subject to and without waiving the foregoing plea of privilege and the sworn denials therein, which are required to be made therein under oath by Rule 93 of the Texas Rules of Civil Procedure, but still insisting upon same and excepting to the action of the court in the event same should be overruled, this defendant comes and respectfully moves this Honorable Court to dismiss this cause insofar as any action is asserted against it herein, because

(a) This defendant excepts to Plaintiff's Original Petition in cause number 112,113 and his First Amended Original Petition in cause number 110,917 and says that each is insufficient in law, because it appears therefrom that this defendant is improperly joined as a defendant with each and all of the other defendants herein numbering approxi-

mately one hundred and forty-three; and of this special exception this defendant prays judgment of the court.

(b) The alleged causes of action asserted against this defendant are improperly joined with each and all of the other alleged causes of action asserted against each and all of the other defendants herein; and of this special exception this defendent prays judgment of the court.

Dan Moody, Capitol National Bank Building, Austin, Texas; Neth L. Leachman, 1600 Republic National Bank Building, Dallas 1, Texas, Attorneys for Defendant, Republic National Bank of Dallas.

[fol. 352]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

ORIGINAL ANSWER OF DEFENDANT BY
REPUBLIC NATIONAL BANK OF DALLAS

Subject to and without waiving this defendant's plea of privilege filed herein, and also next, subject to and without waiving its motion to dismiss hereinabove set out, this defendant comes and files its original answer herein, and for answer says:

I.

This defendant comes and specially *and separately* excepts to being joined in this suit as a defendant with *each* of the other defendants joined herein, because in the case of *each* such joinder there is a misjoinder of parties and causes of action in that: (a) the other defendant in each instance acted at a different time from any act or omission charged against this defendant and independently of this defendant and there was no unity of design between such other defendant and this defendant, by reason of which the tort, if any, of such other defendant was several when committed, and not joint with this defendant; each of the acts or omissions which are alleged as actionable against this defendant were committed or omitted to be done, as the case may be, independently of each of the other defendants herein and not in concert of action with each or any of such other defendants, and consequently this defen-

dant has no responsibility in law for damages which directly and proximately result from the acts of each of the other defendants herein; and (b) the alleged tortious acts of each of the other defendants herein do not join with each of the alleged tortious acts of this defendant to produce an indivisible injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers. Because of all of this, this defendant prays judgment of the court that (1) the actions asserted against this [fol. 353] defendant be severed from all actions asserted against any and all of the other defendants herein, that plaintiff be required to replead and after such repleading and severance the claims, if any, against this defendant be proceeded with separately.

II.

This defendant specially excepts to each and all of the alleged causes of action asserted herein against it by plaintiff, because it affirmatively appears from said petition that each of them is barred by the two year statute of limitations for which reason each of them should be dismissed and this defendant asserts this exception severally as to each asserted claim against it, independently of any other claim, and of this exception, directed as to each of such asserted claims, but including all, this defendant prays judgment of the court.

III.

Further answering, if such be necessary, this defendant comes and specially excepts to said petition on the ground that it is insufficient in law in that it shows on its face that any acts or omissions of this defendant could not and did not bring about the issuance to the I.C.T. of any certificate of authority to do business by the Board of Insurance Commissioners; but if it did, the Receiver for I.C.T. stands in no better position with respect to same than would the I.C.T. and it would not be in a position where it could complain of an act in which it participated and for which it was responsible and of this said defendant prays judgment of the court.

IV.

Further answering, if such be necessary, this defendant comes and specially excepts to said amended petition on the [fol. 354] ground that it shows upon its face that any alleged acts or omissions of this defendant did not cause or contribute to cause any damages to the policyholders, creditors or claimants, stockholders or subscribers to stock of the I.C.T. Insurance Company, and of this said defendant prays judgment of the court.

V.

Further answering, if such be necessary, this defendant comes and specially excepts to said petition as being insufficient in law in that such pleading shows as a matter of law that the alleged losses resulted from the negligent failure of the Board of Insurance Commissioners to fulfill its statutory duty to determine as a fact the solvency of the I.C.T. before issuing any of the several certificates of authority to I.C.T. to transact an insurance business and not from any alleged act or omission of this defendant, and of this said defendant prays judgment of the court.

VI.

Further answering, if such be necessary, this defendant comes and specially excepts to those parts of said petition which assert a cause of action for damages on behalf of creditors, claimants, policyholders, stockholders and stock subscribers based on the contents of a letter addressed to an Examiner of the Board of Insurance Commissioners stating the amount of money on deposit to the credit of I.C.T. on a certain date, because such representation, if not true, was not made to such creditors, claimants, policyholders, stockholders and stock subscribers, etc., nor, if so, was it made with the intent that such parties would be influenced thereby, and of all of this said defendant prays judgment of the court.

[fol. 355] VII.

Further answering, if such be necessary, this defendant comes and specially excepts to each of those allegatioins

contained in said petition which assert a personal cause of action on behalf of certain individuals for fraud and deceit since such personal causes of action are not a part of the property of the Receiver and any judgment entered by the court could not and would not affect the property rights of the persons not subject to its jurisdiction or which was vested in other persons, and of this said defendant prays judgment of the court.

VIII.

Further answering, if such be necessary, this defendant comes and specially excepts to each and all of the allegations in said petition which attempt to base a cause of action against this defendant for fraud and deceit bottomed on alleged misrepresentations as to the financial condition of the I.C.T. because there is no authority in law for the Receiver of said corporation to maintain such a suit and of this said defendant prays judgment of the court.

IX.

Further answering, if such be necessary, this defendant comes and specially excepts to so much of the allegations as are contained in said petition which seek to recover damages on behalf of any creditor, claimant, etc., for whom the Receiver attempts to bring this suit based on any alleged representations of this defendant because it is not alleged that such representations, if so made, were communicated by this defendant to any such creditor, claimant, etc., and further because no cause of action as to such exists even if the Receiver has the capacity to sue on be- [fol. 356] half of said creditors, claimants, etc., for which he does not, and of this said defendant prays judgment of the court.

X.

Further answering, if such be necessary, this defendant comes and specially excepts to these allegations in said petition wherein the Receiver, as a representative of the stockholders and stock subscribers to the I.C.T. capital stock and as a representative of the public interest seeks

to recover the alleged losses suffered by them claimed to be a proximate result of the "sale of and a conspiracy to sell worthless securities to such persons by use of the United States mails in violation of the Federal Securities Act of 1933 (Title U. S. Code, Section 77-L(2))" because said allegations are insufficient in law in that said statute was not enacted for the purpose of nor intended to give to such a Receiver as a representative of such parties such a cause of action, and of this said defendant prays judgment of the court.

XI.

Further answering, if such be necessary, this defendant comes and specially excepts to said petition because the same is insufficient in law in that it is too vague, general, indefinite and uncertain to apprise this defendant of the kind and character of proof intended to be offered upon the trial hereof in that said Receiver claims to represent in the various claims asserted herein the creditors, claimants, policyholders, stockholders and stock subscribers and the public, but he does not allege the names of each of said creditors, claimants, policyholders, stockholders and stock subscribers and the members of the public for whom he sues nor in what amounts as to each and when the claim in favor of each arose and how and in what manner, and of all of this said defendant prays judgment of the court.

[fol. 357]

XII.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant in favor of "the public" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

XIII.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant

in favor of "claimants" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

XIV.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant in favor of "creditors" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

XV.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant in favor of "policyholders" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

[fol. 358]

XVI.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant in favor of "stockholders" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

XVII.

Further answering, if such be necessary, this defendant comes and specially excepts to all of the allegations in said petition in which said Receiver claims to be clothed with the authority to assert causes of action against this defendant in favor of "stock subscribers" because said allegations are insufficient in law, and of this said defendant prays judgment of the court.

XVIII.

Further answering, if such be necessary, this defendant comes and specially excepts to so much of the allegations as are contained in said petition wherein the Receiver seeks to pursue or assert in this statutory receivership proceeding alleged causes of action belonging to claimants, policyholders, stockholders and creditors of the corporation in this receivership proceeding at the expense of this receivership because such is without authority in the statute and to permit same at the expense of this receivership is to deny to or deprive the claimants, policyholders, stockholders and creditors of this corporation their right to participate in such of the assets of the receivership as do come into the possession of the Receiver and which are dissipated in the prosecution of such unauthorized claims, and of all of this said defendant prays judgment of the court.

[fol. 359]

XIX.

Further answering, if such be necessary, this defendant comes and specially excepts to so much of the allegations as are in said petition which attack the licenses under which the I.C.T. operated for several years in Texas because such is an unauthorized collateral attack on the action of the Board of Insurance Commissioners of Texas which in each instance issued such a license and because the Receiver here is the Liquidator of and for the Board of Insurance Commissioners, that is, the agent of such Board, and as such agent he cannot deny the act of his principal which was charged in law with making the necessary investigations and examinations to determine whether a certificate of authority in each case should be granted, and of all of this said defendant prays judgment of the court.

XX.

Further answering, if such be necessary, this defendant comes and specially excepts to all of those allegations in said petition which allege that $15,000,000.00 in damages was incurred by the I.C.T. Insura[illegible] Company *and* by its claimants, etc., because the same is insufficient in law

in that it is too vague, general, indefinite and uncertain to apprise this defendant of the kind and character of proof intended to be offered upon the trial hereof because plaintiff does not allege what damage was incurred by the I.C.T. and what damage was incurred by each of the others for whom the Receiver claims a right to represent and the amount of damage sustained by each of such others, naming them, and when, how and specifically under what circumstances each of such others sustained such damage, and of this said defendant prays judgment of the court.

[fol. 360]

XXI.

For further answer, if such be necessary, this defendant comes and denies all and singular the allegations contained in plaintiff's said petitions which are directed against it and demands strict proof of same, and of this said defendant puts itself upon the country.

XXII.

Further answering, if such be necessary, this defendant comes and says:

(a) That the plaintiff has not the legal capacity to sue as a representative of the creditors, claimants, policyholders, and stockholders of the I.C.T. Insurance Company or any of them.

(b) That the plaintiff has not the legal capacity to sue as a representative of the public interest.

(c) That the plaintiff is not entitled to recover in the capacity in which he sues, viz: "as a representative of its (I.C.T. Insurance Company's) creditors, claimants, policyholders, and stockholders, or any of them."

(d) That the plaintiff is not entitled to recover in the capacity in which he sues, viz: "as a representative of the public interest."

XXIII.

That each alleged claim or cause of action asserted by [fol. 361] plaintiff against this defendant is barred by the two year statute of limitations.

XXIV.

That each alleged claim or cause of action asserted by the plaintiff against defendant is barred by the four year statute of limitations.

XXV.

Further answering, if such be necessary, this defendant comes and says that in each instance under the circumstances of which plaintiff claims a right to recover against this defendant or asserts a right of action against it, the I.C.T. Insurance Company received, had, enjoyed and retained valuable rights under and by virtue of each transaction described at the expense of and with the funds advanced by this defendant; and is now estopped to deny the validity of each and every one of such transactions; and the plaintiff, Receiver for I.C.T. Insurance Company, stands in no better position than the I.C.T. Insurance Company had it continued as a going concern, for which reason he is estopped to deny the legality, validity and enforceability of each of such transactions.

XXVI.

If this defendant has any liability to plaintiff for any sum whatever, the plaintiff is indebted to this defendant in a greater sum, and this defendant pleads such indebtedness as an offset against plaintiff's claim, if any, against this defendant.

XXVII.

Further answering, if such be necessary, this defendant comes and says that each of the alleged claims or cause of action asserted herein against this defendant lies in tort, [fol. 362] arising out of an alleged fantastic overall gigantic conspiracy originated and furthered by all of the defendants herein, some one hundred and forty-four in number, and there is no causal connection between this defendant's alleged participation in the alleged wrongful conspiracy and the loss, if any, alleged to have been sustained by I.C.T. Corporation; that this defendant could not have and ought not to have foreseen or anticipated as a consequence

of its entering into each of the transactions which it had with I.C.T. Insurance Company, the alleged losses claimed by plaintiff herein; that there is nothing herein on which to base an inference that this defendant as an alleged conspirator might reasonably have foreseen or anticipated that as a result of its transactions with I.C.T. Insurance Company, and each of them, the I.C.T. Insurance Company would became insolvent resulting in losses as claimed; and there is no causal connection between the tort alleged and the damage sought to be recovered.

XXVIII.

Further answering, if such be necessary, this defendant comes and says that the I.C.T. Corporation has not sustained any damage which was proximately caused by any of the transactions which it, or any other person, firm or corporation, had with this defendant and which are made the basis of any complaint herein.

Premises considered, this defendant prays that this cause be dismissed for the reasons above stated; and if not dismissed, that plaintiff take nothing by his suit against this defendant and this defendant go hence without day and recover of and from plaintiff all its costs in this behalf [fol. 363] expended, and will forever pray.

Dan Moody, Neth L. Leachman, Attorneys for Defendant, Republic National Bank of Dallas.

Duly sworn to by De Witt Ray, jurat omitted in printing.

[fol. 364]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

CLERK'S ENDORSEMENT RE FILING

(Endorsed) No. 110,917 In the 98th District Court of Travis County, Texas. C. H. Langdeau, Receiver of I.C.T. Insurance Company vs. Ben Jack Cage, et al. Plea of Privilege of Defendant Republic National Bank of Dallas, and Motion to dismiss and Answer subject thereto. Filed

in the 98th District Court of Travis County, Texas, at 11:45 A. M. Jan. 3, 1959, O. T. Martin, Jr., District Clerk, By Eli Greer, Deputy.

[fol. 365]

IN THE DISTRICT COURT 98TH JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

No. 110,917

C. H. LANGDEAU, RECEIVER OF ICT INSURANCE COMPANY

vs.

BEN JACK CAGE, ET AL.

CONTROVERTING AFFIDAVIT OF PLAINTIFF

To the Honorable Judge of Said Court:

Now Comes C. H. Langdeau, plaintiff in the above styled and numbered cause, and makes and files this, his plea controverting the plea of privilege of defendants

Republic National Bank of Dallas,
Mercantile National Bank at Dallas,

filed herein, and would show to the Court the following:

I.

Plaintiff denies the contention of the above named defendants contained in their pleas of privilege to the effect that no exception to the exclusive venue in the county of such defendants' residence, provided by law, exists in this cause, and that this suit does not come within any of the exceptions provided by law in such cases authorizing this suit to be brought or maintained in Travis County or elsewhere outside of the place of such defendants' residence. On the contrary, plaintiff says that venue lies in Travis County for the following reasons.

II.

Plaintiff hereby and herein adopts and incorporates in its entirety and expressly makes a part of this controverting affidavit the same as though herein written, for all purposes, his first amended original petition filed herein on July 21, 1958, the same being identical with plaintiff's original petition filed in Cause No. 112,113 in the 98th District Court of Travis County, Texas, C. H. Langdeau, Receiver, ICT Insurance Company vs Ben Jack Cage et al, [fol. 366] which said cause was consolidated with this cause as Cause No. 110,917 in the 98th District Court of Travis County, Texas, styled C. H. Langdeau, Receiver of ICT Insurance Company vs. Ben Jack Cage, et al., by court order dated November 6, 1958, which said original petition is also adopted and incorporated herein for all purposes as though fully set out herein verbatim; and plaintiff hereby states that the allegations of fact contained in said pleadings are true and correct and that said pleading in this cause seeks to recover damages of each defendant named therein, including the above named defendants, and states a cause of action against each of said defendants, including the above named defendants.

III.

Plaintiff alleges that this Court has jurisdiction and venue in this cause with respect to the above named defendants for the reason that Article 21.28, Section 4(f), Texas Insurance Code, 1951, as amended, provides that the court of competent jurisdiction of the county in which delinquency proceedings are pending, under said article, shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or Receiver; that delinquency proceedings were pending against ICT Insurance Company under said Article 21.28 in this court and county at the time this suit was instituted, and at the time of service of process on the above defendants and at the present time, and, furthermore, this is an action that was instituted by ICT Insurance Company, receivership

estate, and by the Receiver thereof against the above named defendants after the commencement of such delinquency proceedings.

IV.

Plaintiff herein alleges that this Court has jurisdiction and venue of this cause with respect to the above named defendants under and by virtue of Article 1995, Section 4, [fol. 367] V.A.C.S., in that the facts as shown in plaintiff's pleadings described and adopted in Paragraph II of this controverting affidavit allege causes of action in the nature of a conspiracy to defraud the creditors, claimants, policyholders, stockholders and stock subscribers of ICT Insurance Company and the public, and a cause of action for selling and a conspiracy to sell worthless securities by the use of the United States mails in violation of the Federal Securities Act, 1933, jointly and severally against the above named defendants and other defendants, four of which joint defendants, James E. Dunne II, Max Wayne Rychlik, Garland A. Smith and Marcus Loftis, are residents of Travis County, Texas; that plaintiff has a cause of action against these resident defendants, James E. Dunne II, Max Wayne Rychlik, Garland A. Smith and Marcus Loftis, all as shown in the pleadings described and adopted in Paragraph II of this controverting affidavit, to which cause of action each of the above named defendants is a proper party defendant, and furthermore, plaintiff's joint cause of action against the above named defendants and the resident defendants, James E. Dunne II, Max Wayne Rychlik, Garland A. Smith and Marcus Loftis, grew out of the same transactions and plaintiff's cause of action against the above named defendants is so intimately connected with the cause of action against resident defendants, James E. Dunne II, Max Wayne Rychlik, Garland A. Smith and Marcus Loftis, that the same may be brought jointly against all of said defendants to avoid a multiplicity of suits.

V.

The plaintiff herein further alleges that this Court has jurisdiction and venue with respect to the above named

defendants under and by virtue of Article 1995, Section 7, V.A.C.S., in that as shown by the facts in plaintiff's pleadings described and adopted in Paragraph II hereinabove, this cause of action is based upon, in part, acts of fraud which occurred in Travis County, Texas; that, furthermore, [fol. 368] this cause of action against the above named defendants is based upon facts showing a conspiracy to defraud the claimants, creditors, policyholders, stockholders, and stock subscribers of ICT Insurance Company and the public and a cause of action for selling, and a conspiracy to sell, worthless securities by use of the United States mails in violation of the Federal Securities Act of 1933, some of the elements of such conspiracies being the acts of fraud which the plaintiff's pleadings described and adopted in Paragraph II hereof show were committed by certain of the defendants herein in Travis County, Texas; that under the facts alleged showing such conspiracy, the conspiracy is deemed to have been committed when any of the acts of fraud which were in pursuance of the common design and general plan were performed or committed by any of the defendant conspirators or by any person at the instigation of such defendants in Travis County, Texas; that the conspiracy was renewed with every act done in pursuance of the unlawful design, and some of which acts done in pursuance of such unlawful design, as shown by plaintiff's pleadings described and adopted in Paragraph II hereof, were acts of fraud committed by certain defendants in Travis County, Texas, and such fraudulent acts done by the defendant conspirators in Travis County, Texas, became the acts of the above named defendants, and the rest of the defendants who the plaintiff's pleadings described and adopted in Paragraph II hereof show joined, abetted and furthered the conspiracy; that, further, the above named defendants are responsible for such acts of fraud which occurred in Travis County, Texas, whether they directly participated therein or not, because by reason of their joining in any part of the conspiracy, they are responsible for the acts of all other conspirators; that the above named defendants are connected with the whole transaction by reason of their having participated in the

conspiracy, a part of which, as shown by plaintiff's pleadings described and adopted in Paragraph II hereof, was acts of fraud which took place in Travis County, Texas.

[fol. 369] VI.

Plaintiff herein further alleges that this Court has jurisdiction and venue of this cause with respect to the above named defendants under and by virtue of Article 1995, Section 9, V.A.C.S., in that as shown by plaintiff's pleadings described and adopted in Paragraph II hereof this cause of action is based upon, in part, crimes and offenses that occurred in Travis County, Texas, in violation of the following articles of the Texas Penal Code: Art. 1545—Swindling; Art. 1622—Conspiracy to Swindle; Art. 1546a—False Written Statements of Financial Condition; Art. 1554—Untrue Advertisement; Art. 302—Perjury; Art. 310—False Swearing; Art. 316—Subornation of Perjury or False Swearing; Art. 571—Violating Insurance Law; Art. 571a—Violating Law as to Automobile Insurance; and Art. 597—Violating Fire Insurance Law; for which offenses and crimes certain of the defendants are punishable under these articles of the Penal Code; that, furthermore, this cause of action jointly against the above named defendants and the other defendants, as alleged in plaintiff's pleadings described and adopted in Paragraph II hereof, is based upon facts showing a conspiracy to defraud the claimants, creditors, policyholders, stockholders, and stock subscribers of ICT Insurance Company and the public, and a cause of action for selling, and a conspiracy to sell, worthless securities by use of the United States mails in violation of the Federal Securities Act of 1933, some of the elements of such conspiracies and causes of action being the crimes and offenses which the plaintiff's pleadings described and adopted in Paragraph II hereof show were committed by certain of the defendants herein in Travis County, Texas, and for which acts, those defendants are punishable under the Penal Code as hereinabove alleged. Under the facts showing such conspiracy, the conspiracy is deemed to have been committed when any of these crimes and offenses, in pursuance of the common design and general plan, were

performed by any of the defendant conspirators, or by any person at the instigation of such defendants in Travis County, Texas; that the conspiracy was renewed with every [fol. 370] act done in pursuance of the unlawful design, and some of which acts done in pursuance of such unlawful design, as shown by plaintiff's pleadings described and adopted in Paragraph II hereof, were crimes and offenses committed in Travis County, Texas, and the crimes and offenses committed by any defendant conspirator in Travis County, Texas, became the act of the above named defendants and the rest of the named defendants in this civil action who the plaintiff's pleadings described and adopted in Paragraph II hereof show joined, aided and abetted the conspiracy; and further, the above named defendants are civilly responsible for such crimes and offenses which occurred in Travis County, Texas, whether they directly participated therein or not, since by reason of their joining any part of the conspiracy, they are responsible in this civil action for the acts of all; that the above named defendants participated in the conspiracy, a part of which, as shown by plaintiff's pleadings described and adopted in Paragraph II hereof, were crimes and offenses which took place in Travis County, Texas, and they are, therefore, connected with the whole transaction.

Wherefore, Premises Considered, plaintiff prays the Court to overrule the pleas of privilege heretofore filed by the above named defendants.

Cecil Rotsch, P. O. Box 13, Austin, Texas: Wilson & Cureton, 401-6 Professional Building, Waco, Texas, By Sam Lanham, Attorneys for Plaintiff.

The State of Texas
County of McLennan

Before Me, the undersigned authority, on this day personally appeared Sam Lanham, known to me, who being by me first duly sworn upon his oath states that he is an associate of the firm of Wilson & Cureton, Attorneys at Law, who together with Cecil Rotsch are attorneys of record for the plaintiff in the above cause, and as such has

authority to make this affidavit; that the matters and facts [fol. 371] set out in the foregoing controverting affidavit are true and correct; and that the allegations of fact contained in the plaintiff's pleadings described in Paragraph II of said controverting affidavit, which pleadings are made a part of such controverting affidavit and incorporated therein as though therein written, for all purposes, are true and correct.

Sam Lanham.

Subscribed and Sworn to before me this 7th day of January, 1959.

Lois Burkes, Notary Public, McLennan County, Texas.

Seal.

[fol. 372]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 110,917

(Being No. 110,917 and No. 112,113 Consolidated as No. 110,917)

C. H. LANGDEAU, Receiver of ICT INSURANCE COMPANY,

vs.

BEN JACK CAGE, et al.

ORDER OVERRULING PLEA OF PRIVILEGE OF REPUBLIC NATIONAL BANK OF DALLAS—April 2, 1959

On the 20th day of February, 1959, came on to be heard by agreement of the parties the plea of privilege of defendant, Republic National Bank of Dallas, and the Court having heard the pleadings, evidence and argument of counsel is of the opinion that said plea of privilege should be overruled;

It Is Therefore Ordered, Adjudged and Decreed by the Court that the plea of privilege of Republic National Bank of Dallas be, and same is hereby overruled, to which action of the Court said defendant in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Dated, signed and rendered this 2nd day of April, 1959.

D. B. Wood, Judge Presiding.

Approved as to Form:

Cecil C. Rotsch.

Wilson & Cureton, By Frank M. Wilson, Attorneys for C. H. Langdeau, Receiver of ICT Insurance Company.

Neth L. Leachman, Dan Moody, By Henry D. Akin, Attorneys for Republic National Bank of Dallas.

Filed in the 98th District Court of Travis County, Texas, at 12:00 Noon, April 2, 1959, O. T. Martin, Jr., District Clerk, By Mrs. Chas. Kohrs, Deputy.

[fol. 373]

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 110,917

(Being No. 110,917 and No. 112,113 Consolidated as No. 110,917)

C. H. LANGDEAU, Receiver of ICT INSURANCE COMPANY,

VS.

BEN JACK CAGE, et al.

ORDER OVERRULING PLEA OF PRIVILEGE OF MERCANTILE NATIONAL BANK AT DALLAS—April 2, 1959

On the 20th day of February, 1959, came on to be heard by agreement of the parties the plea of privilege of defendant, Mercantile National Bank at Dallas, and the Court having heard the pleadings, evidence and argument of

counsel is of the opinion that said plea of privilege should be overruled;

It Is Therefore Ordered, Adjudged and Decreed by the Court that the plea of privilege of Mercantile National Bank at Dallas be, and same is hereby overruled, to which action of the Court said defendant in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Dated, signed, and rendered this 2nd day of April, 1959.

D. B. Wood, Judge Presiding.

Approved as to Form:

Hubert D. Johnson, Attorney for Mercantile National Bank at Dallas.

Cecil C. Rotsch.

Wilson & Cureton, By Frank M. Wilson, Attorneys for C. H. Langdeau, Receiver of ICT Insurance Company.

Filed in the 98th District Court of Travis County, Texas at 12:00 Noon, Apr. 2, 1959. O. T. Martin, Jr., District Clerk, By Mrs. Chas. Kohrs, Deputy.

[fol. 374]

IN THE DISTRICT COURT OF TRAVIS COUNTY
IN AND FOR THE 98TH JUDICIAL DISTRICT OF TEXAS

No. 110,917

(Being No. 110,917 and No. 112,113
Consolidated as No. 110,917)

C. H. LANGDEAU, Receiver of ICT INSURANCE COMPANY,

vs.

BEN JACK CAGE, ET AL.

AGREEMENT UNDER RULE 378 OF THE TEXAS RULES OF CIVIL PROCEDURE

Plaintiff in this cause and Mercantile National Bank at Dallas and Republic National Bank of Dallas, two of the

Defendants in this cause, acting by and through and represented by their attorneys of record herein, have stipulated and agreed and do hereby stipulate and agree as follows:

1. A single hearing on the pleas of privilege of said two Defendants was held on February 20, 1959 by mutual agreement of said parties.

2. For purposes of such hearing and any appeal by any of said parties from the trial court's ruling thereon, said parties stipulate and agree as follows:

a. The following recitals of fact contained in Plaintiff's pleading designated "Plaintiff's First Amended Original Petition in Cause No. 110,917, and Plaintiff's Original Petition in the Second Numbered Cause (No. 112,113)," are stipulated to be true statements of fact:

"That the plaintiff, C. H. Langdeau, is a resident of Travis County, Texas. On February 20, 1957, in an action in the nature of a quo warranto proceeding by the State of Texas, such action being styled: The State of Texas v. ICT Insurance Company, et al., being Cause No. 106,184, on the docket of the 98th District Court of Travis County, J. D. Wheeler was by order of said Court appointed Temporary Re- [fol. 375] ceiver of and for said ICT Insurance Company, pending further orders of the Court; that said J. D. Wheeler duly qualified as Temporary Receiver of said ICT Insurance Company on February 20, 1957, and acted in such capacity until March 5, 1957, at which date a final order was entered in said Cause appointing the said J. D. Wheeler as Permanent Receiver of ICT Insurance Company; that the said J. D. Wheeler duly qualified as such Permanent Receiver on March 5, 1957, and thereafter acted continuously in such capacity until March 4, 1958, on which date the said J. D. Wheeler resigned. By order of the said 98th District Court in said Cause dated March 4, 1958, James M. Williamson was duly appointed Receiver of ICT Insur-

ance Company and he duly qualified as such Receiver on the same day and acted in such capacity until June 10, 1958. On July 21, 1958, C. H. Langdeau was appointed as Receiver of ICT Insurance Company and on the same date C. H. Langdeau qualified as Receiver and since said appointment he has been acting continuously in such capacity; that in said Order of Appointment, C. H. Langdeau as such Receiver of the ICT Insurance Company, succeeded to all of the properties, rights, and choses in action which exist in favor of ICT Insurance Company . . . and under the laws and orders of the 98th District Court the said C. H. Langdeau was authorized to maintain this action for the wrongful acts committed as against ICT Insurance Company. . . . "

b. On June 10, 1958 in Cause No. 106,184 the Court entered an order removing James M. Williamson as Receiver and appointing V. F. Taylor as Receiver, and the latter thereupon filed his oath and bond as Receiver.

c. Said Cause No. 106,184 referred to in subparagraph a. above, which was instituted in the 98th District Court of Travis County, Texas on February 20, 1957, was still pending in that Court on February 20, 1959 and is still pending in that Court as of the present date.

d. As of February 20, 1957 and all times thereafter down to and including the present Mercantile National Bank at Dallas and Republic National Bank of [fol. 376] Dallas were and are national banking associations organized and existing under the laws of the United States of America known as the National Bank Act, each having its principal and only place of business in the City of Dallas, Dallas County, Texas.

e. The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said Plaintiff's action against them transferred to the state

court in Dallas County, Texas or whether state statutes on venue of such action were controlling.

f. That at the time of the institution of the suits herein described the 98th District Court of Travis County, Texas, a court of competent jurisdiction, had found that a Receiver should take charge of the assets of ICT Insurance Company, and that at the time of the appointment of C. H. Langdeau, Receiver, he had been duly designated as Liquidator by the Board of Insurance Commissioners under the provisions of Article 21.28 of the Insurance Code of Texas and pursuant to the provisions of said Article was appointed Receiver by the said 98th District Court of Travis County, Texas, and duly qualified in said Cause No. 106,184 as above stated.

3. Since the matters herein stipulated by the parties fairly and adequately cover the material portions of the exhibits introduced at said hearing on February 20, 1959 and no other evidence was offered, this Agreement is to be included in the official transcript as provided in Rule 378 [fol. 377] of the Texas Rules of Civil Procedure.

4. Said parties request the District Clerk to include in the official transcript for appeal copies of pleadings and filed papers designated by any party together with a copy of this Agreement.

Dated this 13th day of April, 1959.

Cecil C. Rotsch.

Wilson & Cureton, By Frank M. Wilson, Attorneys for C. H. Langdeau, Receiver of ICT Insurance Company.

Hubert D. Johnson, Attorney for Mercantile National Bank at Dallas.

Henry D. Akin, Attorney for Republic National Bank of Dallas.

[fol. 382]

IN THE COURT OF CIVIL APPEALS

No. 10,711

REPUBLIC NATIONAL BANK OF DALLAS,

v.

C. H. LANGDEAU, Receiver.

Appeal From 98 District Court of Travis County
Opinion by Associate Justice Hughes

JUDGMENT RENDERED—December 9, 1959

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, It Is Therefore considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the cause is remanded with instructions to render judgment sustaining appellants' plea of privilege and transfer this cause as to appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P. It is Further ordered that the appellee pay all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance.

[fol. 383]

IN THE COURT OF CIVIL APPEALS

No. 10,712

MERCANTILE NATIONAL BANK AT DALLAS,

vs.

C. H. LANGDEAU, Receiver.

Appeal From 98 District Court of Travis County
Opinion by Associate Justice Hughes

JUDGMENT RENDERED—December 9, 1959

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, It Is Therefore considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the cause is remanded with instructions to render judgment sustaining appellants' plea of privilege and transfer this cause as to appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P. It is Further ordered that the appellee pay all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance.

[fol. 383a]

IN THE COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

No. 10,711 and No. 10,712

MERCANTILE NATIONAL BANK AT DALLAS (#10,712),

and

REPUBLIC NATIONAL BANK OF DALLAS (#10,711), Appellants,

vs.

C. H. LANGDEAU, Receiver, Appellee.

From District Court of Travis County, 98th Judicial District, No. 110,917, Honorable D. B. Wood, Judge.

OPINION—December 9, 1959

These are venue cases in which the parties have stipulated to the controlling facts and issues.

The controlling facts are that the appellants, Mercantile National Bank at Dallas and the Republic National Bank of Dallas, are, and were at all material times, national banking associations organized and existing under the laws of the United States of America (National Bank Act) with each having its principal and only place of business in Dallas, Dallas County, Texas, and appellee, C. H. Langdeau, Receiver (and his predecessors),[1] was at all such times the duly appointed, qualified and acting Receiver for [fol. 383b] and had taken charge of all the assets of ICT Insurance Company in receivership proceedings in the 98th District Court of Travis County, a court of competent jurisdiction, and who had been designated as Liquidator for such company by the Board of Insurance Com-

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[1] The history of prior receivers is stipulated but is not material.

missions of Texas and who, under the laws and orders of the 98th District Court was authorized to maintain this action for the alleged wrongful acts committed by appellants against ICT Insurance Company.[2]

The question of law presented was stipulated to be:

> "The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said plaintiff's action against them transferred to the state court in Dallas County, Texas, or whether state statutes on venue of such action are controlling."

The federal statutes referred in this stipulation are, and we quote them:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Sec. 94, Title 12, U. S. Code, Annotated.[3]
>
> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

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[2] The detailed nature of this suit is not material to these appeals except to state that it is a suit for damages based on an alleged conspiracy.

[3] This section is a part of Chapter 2 of Title 12 of the United States Code, Annotated. Title 12 is entitled: "Banks and Banking." Chapter 2 of said Title, in which is included Section 94, is entitled "National Banks," Section 94 is entitled "Venue of Suits."

> "All national banking associations shall, for the purposes of all other actions by or against them, be [fol. 383c] deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348.[4]

The State statute referred to is Section 21.28, Subsection 4(f) of the Texas Insurance Code, which we quote:

> "New Lawsuits. The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

There can be no doubt that if venue of these cases is fixed in Dallas by Federal laws the State statute is of no avail. We quote from Van Reed v. People's National Bank, 198 U. S. 554, 25 S. Ct. 775:

> "National banks are quasi-public institutions, and, for the purpose for which they are instituted, are national in their character and within constitutional limits subject to the control of Congress, and are not to be interfered with by State legislative or judicial action, except so far as the law making power of the government may permit."

In Citizens National Bank of Stamford v. Stevenson, 231 S.W. 364, Tex. Comm. of Appeals (opinion by Judge Powell) it is stated:

> "It is well settled that, if the federal and state provisions upon any point with reference to national banks, conflict, the state rules must yield."

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[4] This Section is a part of Chapter 85 of Title 28 of the United States Code, Annotated. Title 28 is entitled: "Judiciary and Judicial Procedure." Chapter 85 of said Title in which is included Section 1348 is entitled: "District Courts, Jurisdiction." Section 1348 is entitled: "Banking Association as party."

Mr. Justice Hart in Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428, stated this rule for construing Federal statutes:

> "In determining the meaning of Federal laws, this Court is controlled by the decisions of the Supreme Court of the United States. . . . In this instance, however, there does not appear to be any decisions by the United States Supreme Court which is directly in [fol. 383d] point, and we have to try to arrive at the meaning of the statute from that Court's opinions in more or less analogous cases."

We will now undertake a determination of the question presented from the decided cases of the United States Supreme Court either directly in point or "from that Court's opinions in more or less analogous cases."

For a better understanding of these opinions we give the following condensed history of Section 94 of Title 12, supra:

The Act of June 3, 1864, known as the National Bank Act (13 Stat. 99) contained the following as a part of Section 57:

> "Suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In the Revised Statutes of the United States, enacted in 1873, there was no statute comparable to Section 57 of the National Bank Act of June 3, 1864. This omission was remedied by the Act of February 18, 1875 (18 Stat. 316, 320) which added a statute identical with present Section 94, Title 12.

When the corrective legislation of 1875 was enacted however it was as an amendment, by addition, to Section 5198 of the 1873 revision of the United States statutes, which Section dealt only with penalties for charging usuri-

ous interest. These provisions were separated in the United States Code adopted June 1926 and the provision relating to penalties was given Section number 86 and the provision as to venue was given Section number 94.

No other changes were or have been made in Section 94.

The predecessor of Section 94 was construed by the [fol. 383e] United States Supreme Court in First National Bank of Charlotte, North Carolina v. Morgan, 132 U.S. 141, U.S. S.Ct. Rep. 282 (1889). There a national bank was sued in a State Court in a county other than the one in which it was located. No objection on this account was made until the case reached the State Supreme Court. In holding that the privilege of being sued in its home county could be waived by the bank the United States Supreme Court, Mr. Justice Harlan speaking, said:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in this business that might result from their books being sent to distant counties in obedience to process from state courts. First Nat. Bank of Bethel v. Pahquioque Nat. Bank, 81 U.S. 14 Wall, 383, 394 (20:840, 842); Crocker v. Marine Nat. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did now, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts

> of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

[fol. 383f] In Cope v. Anderson, 331 U. S. 461, 67 S. Ct. 1340 (1947) a receiver of an insolvent Kentucky national bank brought suit in Federal District Courts in Ohio and Pennsylvania to enforce stockholders' assessments against Ohio and Pennsylvania stockholders. The question was whether Kentucky statutes of limitation or limitation statutes of Ohio and Pennsylvania controlled. In holding that the cause of action arose in Kentucky and its statutes applied, the Court, Mr. Justice Black speaking, stated:

> "Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U.S.C.A., Sections 30, 33, 34a, 36, 51, 62, 72, 4 F.C.A., Title 12, Sections 30, 33, 34a, 36, 51, 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the State in which it is established or located, 28 U.S.C.A., Sec. 41(16), 7 F.C.A. Title 28, Sec. 41(16), and in that district alone can it be sued. 12 U.S.C.A., Sec. 94, 4 F.C.A. Title 12, Sec. 94."

The one United States Supreme Court case upon which appellees rely is Casey, Receiver v. Adams, 102 U.S. 68, 26 L.Ed. 52 (1880).[5] There proceedings were taken against

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[5] Appellants do cite and quote the following from Bank of America v. Whitney Central National Bank, 261 U.S. 171, 67 L. Ed. 594:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to a suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

a national bank in a State court in a parish other than the one in which it was located, in or as a result of a suit to foreclose a mortgage on land. The suit was brought in and the proceedings held in the parish in which the land was situated. The bank objected that it could be sued only in the county of its location. In an opinion delivered by Mr. Chief Justice Waite, the Court held:

> "The federal question in this case is, whether a national bank can be sued in a state court in a local action in any other county or city than that where the [fol. 383g] bank is located. By sec. 5198, R.S., it is provided that 'Suits, actions and proceedings against any association under this title (the National Banks) may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.' This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the Act of Congress the construction now contended for, would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

> The proceeding in this case was clearly local in its nature. It related to property in the Parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until 'a conflict of privileges' arising between creditors was settled."

We agree with appellee that Art. 21.28, Section 4(f), V.A.C.S. creates a statutory local action. We do not agree that such actions are necessarily local in nature as that term was used by the Supreme Court in Casey against Adams. This action, a suit for damages for alleged malfeasance, is by no stretch of the imagination local in nature or in character. Morris v. Mo. Pac. Ry. Co., 78 Tex. 17, 14 S.W. 228, Miller v. Howell, 234 S.W. 925, Ft. Worth Court of Civil Appeals.

This, to our satisfaction, distinguishes Casey against [fol. 383h] Adams and prevents it from being a case directly in point. We are convinced, too, that Casey does not represent the law as reflected by subsequent United States Supreme Court decisions, supra. Those decisions, in our opinion, fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94.

Appellee does not discuss the Federal District and Circuit Court decisions cited by appellants and disposes of them by saying:

> "Decisions by the U. S. Circuit Courts and decisions by the U. S. District Courts in suits filed in Federal Courts have no bearing and are unrelated to the question because State Venue Statutes do not control or purport to govern the venue of such suits."

Appellee does, however, cite nine State cases,[6] each from a separate State in support of its position. These cases

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[6] "Texas: Guerra vs. Lemburg, 22 S.W.(2d) 336, (1929) (Writ. Dis.).

New York: Chafee vs. Glen Falls National Bank & Trust Co., 123 N.Y.S. (2d) 635 (1953). Affirmed 128 N.Y.S. (2d) 539; Appeal to Court of Appeals denied 129 N.Y.S.(2d) 237.

(one or more) are to the effect that Section 94 applies (1) only in usury cases (2) in transitory cases or (3) that it is permissive (4) that it was repealed by Section 1348, supra, or (5) as stated by the New Jersey Supreme Court in Cassatt:

> "We are inclined to think that the direct application of the statute is to jurisdiction and that it is not in such potent control of venue as to be imperative in the present case."

[fol. 383i] The Federal District and Circuit Court cases cited by appellants are listed below[7] as are the State Court decisions upon which they rely.[8]

Michigan: Levitan vs. Houghton Bank, 140 N.W. 1019, 174 Mich. 566 (Sup. Ct. 1913).

Minnesota: DeCock vs. O'Connell, 246 N.W. 885, 86 A.L.R. 41 (Sup. Ct. 1933).

North Carolina: Curlee vs. Bank, 187 N.C. 119, 121 S. E. 194 (Sup. Ct. 1924).

Wisconsin: Brust vs. Bank, 184 Wisc. 15, 198 N.W. 749 (Sup. Ct. 1924).

New Jersey: Cassatt vs. Bank, 9 N. J. Misc. Rep. 222, 153 A. 377 (Sup. Ct. 1931).

Alabama: Bank vs. Alston, 165 So. 241 (Sup. Ct. 1936).

California: Fresno National Bank vs. Superior Court, 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890)."

[7] Buffum v. Chase National Bank, 192 F. 2d 58, Certiorari denied, 242 U.S. 994, 72 S. Ct. 558.

International Refugee Organization v. Bank of America, 86 F. Supp. 884.

Schmitt v. Tobin, 15 F. Supp. 35.

Leonardi v. Chase National Bank, 81 F. 2d 19, 2nd Cir. Certiorari denied, 298 U.S. 667.

[8] County of Okeechobee v. Florida Nat. Bank, 150 So. 124 (Florida 1933).

Monarch Wine Company v. Butte, 249 P.2d 291 (Cal. 1952).

Zarbell v. Bank of America Nat. Trust & Saving Association, 327 P.2d 436 (Wash. 1958).

Crofoot v. Giannini, 92 N.Y.S. 2d 191 (1949).

Rabinowitz v. Kaiser-Frazer Corporation, 96 N.Y.S. 2d 638 (1950).

If the question here presented has not been decided by the United States Supreme Court or if the meaning of Section 94 cannot be gleaned from its opinions in more or less analogous cases and if the question is an open one for this Court then we state that we have considered all State cases and Federal decisions from lower courts for their persuasiveness. Especially have we been impressed by the thorough treatment of the matter and the sound reasoning found in the Monarch Wine case from California and we quote the following from that opinion:

> "The federal cases interpreting section 94 seem to establish three propositions: (1) Where actions against a national bank are brought in a state court outside the state where it is located the action must be dismissed because there is no procedure for transferring the action from one state to another. See Schmitt v. Tobin, D. C., 15 F. Supp. 35, where an action brought in Nevada against a California national bank was dismissed. (2) Where the actions are brought in a federal court in a district other than that in which the bank is located the actions formerly were required to be dismissed as the federal law provided no procedure for transfer. See Leonardi v. Chase Nat. Bank of City of New York, 2 Cir., 81 F. 2d 19, where the court dismissed an action brought against a national bank [fol. 383j] in a federal court in a district other than that of the bank's residence. To the same effect, International Refugee Organization v. Bank of America, etc., D. C., 86 F. Supp. 884, and Buffum v. Chase National Bank of City of New York, 7 Cir., 192 F. 2d 58. Such a procedure has now been provided and the case would now be transferred to the proper district. Plaintiffs concede that the law as to these two propositions is as above stated. (3) Where the action is brought in a state court of a state in which the bank is located but not in the county of its location, and where state law has a procedure for change of venue, the action must not be dismissed, but upon application must be transferred to the county in which the bank is located.

"The New York courts since 1883 in dealing with the question of whether the statute in question is mandatory or permissive, have held it mandatory, saying, 'Where the meaning of a federal statute is to be ascertained, the decisions of the federal courts construing the statute are controlling on the state courts.' Raiola v. Los Angeles First Nat. Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 305; see also Crofoot v. Giannini, supra, 92 N.Y.S. 2d 191, and Rabinowitz v. Kaiser-Frazer Corporation, 198 Misc. 312, 96 N.Y.S. 2d 638. While these were cases dealing with actions against national banks whose residences were outside the state we can see no difference in the language or the effect of that portion of section 94 referring to suits not brought in the state of the bank's residence and those not brought in the county of its residence. Crocker v. Marine National Bank of New York, 101 Mass. 240, and Burns v. Northwestern Nat. Bank of Minneapolis, Minn., supra, 260 N.W. 253, held the same way as the cited New York cases.

"Guerra v. Lemburg, Tex. Civ. App., 22 S.W. 2d 336, contrary to the decisions in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F. 2d 19, Schmitt v. Tobin, supra, 15 F. Supp. 35, and Rabinowitz v. Kaiser-Fraser Corp., supra, 96 N. Y. S. 2d 638, held that section 94 applied only to actions for penalties for usury. Cassatt v. First Nat. Bank, 153 A. 377, 9 N.J. Misc. 222, without discussing the federal cases on the subject and in spite of them, held section 94 applied to jurisdiction and not to venue.

"The language in Buffum v. Chase Nat. Bank of City of New York, supra, 192 F.2d 58, at page 60, although the court was dealing with an action brought against a bank in a state other than that of its residence, applies here: 'The issue here then is not one of jurisdiction of the subject matter, but one as to the proper venue, the proper locality. Neirbo Co. v. [fol. 383k] Bethlehem Shipbuilding Corp., 308 U.S. 165, at page 168, 60 S. Ct. 153, 84 L. Ed. 167. It seems clear that the proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U.S.C.A.'

> "In spite of the above decisions of some state courts we believe (1) we are bound by the decisions of the United States courts on the interpretation of section 94; (2) those courts have held directly in the Charlotte and Casey cases as to suits brought in the wrong county of a state and indirectly in other cases dealing with suits brought in the wrong state or in the wrong federal district, that section 94 is mandatory. If it was intended that the national bank could be sued in any court of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located.' But the section said the action is to be brought in the 'court in the county or city' in which the bank is located. (3) The plain and logical reading of the section shows that there is no difference in meaning between the various portions of the section, and (4) defendant is entitled as a matter of right under section 94 to a change of venue to the county of its residence. Hence the order denying its motion for such change was erroneous."

Our opinion, influenced by the decision of Circuit Court of Appeals in Leonardi (f.n. 7), with which we agree, is that the San Antonio Court in Guerra erroneously concluded that Section 94 applied only to actions for penalties arising from usury.

In our study of this case we have been struck by the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous. While it was entangled with the usury provisions of the federal law, confusion was understandable.

Since the separation of Section 94 from the usury provisions of Title 12 (1926) we can find no tenable ground upon which to construe a plain statute in any manner contrary to its express wording.

That this statute should be construed as merely permitting a national bank to be sued in the county of its location is to attribute to the Congress little knowledge of the law of venue. Both the common law and the Spanish

[fol. 383] law permitted suits to be maintained where the defendant resided[9] and such is the general rule of the States.[10]

The judgments of the Trial Court are reversed and these causes are remanded with instructions to render judgment sustaining appellants' pleas of privilege and to transfer these causes as to these appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P.

Robert G. Hughes, Associate Justice.

Reversed and Remanded with Instructions.

Filed: December 9, 1959.

[fol. 384]

IN THE SUPREME COURT OF TEXAS

No. A-7728

C. H. LANGDEAU, Receiver,

vs.

REPUBLIC NATIONAL BANK OF DALLAS.

From Travis County, Third District

JUDGMENT—November 23, 1960

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Calvert concurring in the result) that there

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[9] Vol. 38, Tex. Law Review, p. 36. Spanish Influence on the Texas Law by Joseph Webb McKnight.

[10] Vol. 92 C.J.S., Venue, Sections 4, 6, 7 and 82.

was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, in all things affirmed.

It is further ordered that respondent, Republic National Bank of Dallas, and the surety on its appeal bond, The Aetna Casualty and Surety Company, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, C. H. Langdeau, Receiver of I. C. T. Insurance Company, have and recover of and from the said Republic National Bank of Dallas, and surety, The Aetna Casualty and Surety Company, the costs by him expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance.

[fol. 385]

IN THE SUPREME COURT OF TEXAS

No. A-7729

C. H. LANGDEAU, Receiver,

vs.

MERCANTILE NATIONAL BANK AT DALLAS.

From Travis County, Third District

JUDGMENT—November 23, 1960

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Calvert concurring in the result) that there

was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, in all things affirmed.

It is further ordered that respondent, Mercantile National Bank at Dallas, and the surety on its appeal bond, American Surety Company of New York, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, C. H. Langdeau, Receiver of I. C. T. Insurance Company, have and recover of and from the said Mercantile National Bank at Dallas, and surety, American Surety Company of New York, the costs by him expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance.

[fol. 385a]

IN THE SUPREME COURT OF TEXAS
FROM TRAVIS COUNTY, THIRD DISTRICT

No. A-7728

C. H. LANGDEAU, Receiver for I.C.T. INS. CO., Petitioner

v.

REPUBLIC NATIONAL BANK OF DALLAS, Respondent

No. A-7729

C. H. LANGDEAU, Receiver for I.C.T. INS. CO., Petitioner

v.

MERCANTILE NATIONAL BANK AT DALLAS, Respondent

OPINION—November 23, 1960

These venue cases present but a single question of law which may be disposed of in one opinion.

The question presented is: Does Title 12 U.S.C.A., §94,[1] give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f)[2] of the Insurance Code, the right to have [fol. 385b] an action against it tried in the county of its domicile?

The Court of Civil Appeals in its opinion reported in Vol. 331, S.W. 2d 349, answered the question in the affirmative. The opinion, in effect, sustained the bank's position: (1) that federal statutes are paramount on matters affecting such federal instrumentalities as national banks, and that state statutes in conflict therewith must yield to the federal statutes, and (2) that the decisions of United States courts involving the construction of federal statutes relating to national banks are binding on state courts and that the state venue statutes are not applicable.

The record reveals that delinquency proceedings were filed in the 98th District Court against I.C.T. Insurance Company and petitioner, C. H. Langdeau, was appointed

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[1] "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the country or city in which said association is located having jurisdiction in similar cases. Sec. 94, Title 12, U.S. Code, Annotated.

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348."

[2] "New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

receiver under the provisions of Section 2(a) of Article 21.28, supra, of the Insurance Code.

Thereafter, petitioner instituted this suit against a number of defendants, including the two respondent national banks, charging a conspiracy to defraud the insurance company, its policyholders, stockholders, and creditors, and sought a judgment against all defendants, jointly and severally. In effect, it is a suit for the recovery of assets of the delinquent insurance company. In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed.

The respondents' pleas of privilege to be sued in Dallas County, Texas, the county of the residence and location of each bank, were overruled by the trial court, but sustained by the Court of Civil Appeals as already stated. We deem it necessary to take note of the respondents' challenge to the jurisdiction of this court, which is to the effect that when, as here, a conflict of decisions is made the basis of Supreme Court jurisdiction, it is essential that such conflict appear on the face of the opinions themselves, and that petitioner has failed to meet such test. This test is laid down in the case of State v. Wynn, —— Tex. ——, 301 [fol. 385c] S.W. 2d 76. We believe that the decision in the present case is sufficiently in conflict with the decision in the case of Guerra v. Lemburg, 22 S.W. 2d 336, er. dism. to give this court jurisdiction.

In the case of Guerra v. Lemburg, supra, the Commercial State Bank of Sinton, San Patricio County, Texas, and the City National Bank of Corpus Christi, Nueces County, Texas, were sued in Hidalgo County, the residence of a co-defendant. The National Bank of Corpus Christi filed a plea of privilege to be sued in its home county claiming, as the respondents claim in the present case, that under the provisions of 12 U.S.C.A. §94, a national bank can only be sued in a state court in the county of its domicile, regardless of the fact that under the provisions of the Texas venue statutes, the suit could have been brought in Hidalgo County where alleged fraudulent representations were made. The trial court sustained the plea of privilege. The Court of Civil Appeals reversed, holding that the bank

was not entitled to a change of venue,[3] thereby holding directly opposite to the holding in the present case. The Court of Civil Appeals in the present case quotes at length from the case of Monarch Wine Company v. Butte, Dist. Ct. of Appeals (Calif. 1952), 249 P. 2d 291. That case refers to the case of Guerra v. Lemburg, supra, and the case of Leonardi v. Chase National Bank of the City of New York, 2 Cir., 81 F. 2d 19. The Court of Civil Appeals cites this latter case in support of its holding that the [fol. 385d] federal statute controls. The Monarch Wine Company case, supra, held that the decision in the Guerra v. Lemburg case, supra, is contrary to the decision in Leonardi, supra, and the opinion of the Court of Civil Appeals in the present case hold that the Guerra case was erroneously decided, and that it agrees with the Leonardi case. We are convinced that the specific conflicting holdings in the two cases create a jurisdictional conflict. The holdings are so far upon the same state of facts that the decision of one of the cases is necessarily conclusive of the decision in the other. See Dockum v. Mercury Ins. Co.,

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[3] Quote from Guerra v. Lemburg, supra:

"In * * * (28 U.S.C.A. § 41(16), national banks are declared to be, for the purposes of all other actions except those enumerated, against or by them, for property, * * *, and suits in equity, citizens of the states in which they are respectively located. Being citizens of a state carries with such citizenship the burdens, as well as the privileges, pertaining to it. This is provided in * * * (12 U.S.C.A. § 24(4), as to national banks, where they are given the power 'to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.'

"In conferring jurisdiction generally upon state courts in regard to suits against national banks, * * * the provision in question is embodied * * * under the head 'Usurious Interest' (12 U.S.C.A. §§ 86, 94), showing conclusively that no provision preventing national banks from being sued in state courts, under any and all other circumstances, in any other than the county of the domicile is in existence. The provision has reference alone to actions for penalties arising from usury, which is legislated against in the paragraph cited. The law does not apply to any other class of actions, and in all other suits national banks are citizens of the state in which they are located, clothed with the privileges of citizenship, and subject to any burdens and liabilities attached thereto."

134 Tex. 437, 135 S.W. 2d 700. Accordingly, the application for writ of error presents a case within the jurisdiction of this court.

We now proceed to a decision of the principal question. We have concluded to reverse the judgment of the Court of Civil Appeals and affirm that of the trial court for the reasons now to be stated.

If, under federal decisions, United States Revised Statute No. 5198, 12 U.S.C., Sec. 94, is applicable here, then all state statutes in conflict therewith must yield. See Van Reed v. Peoples National Bank, 198 U.S. 554, 25 S. Ct. 775; Citizens National Bank of Stamford v. Stevenson, 231 S.W. 364, Tex. Comm. App. We agree that the issue here also is not one of jurisdiction, but is one as to the proper venue, or proper locality where a state statute has fixed venue. However, we do not agree with respondents' contention that the proper venue of this action is determined by Section 94 of 12 U.S.C., supra. See Casey v. Adams, 102 U.S. 68, 26 L. ed. 52 (1880). The proper venue of this case is determined by Article 21.28, 4(f), supra, which provides in effect, that the court of competent jurisdiction of the county in which the delinquency proceedings are pending shall have venue to hear and determine all actions or [fol. 385-e] proceedings instituted after the commencement of the delinquency proceedings.

It was not the intention of the Congress in adopting 12 U.S.C., Section 94, supra, that it was to control with respect to an action against a national bank commenced in a state court, especially where such action was commenced in a district court located in the county designated by state statute to have venue. This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes. It is unnecessary to our decision to determine whether this particular action is local or transitory in nature. Texas has adopted Article 21.28, supra. This is the statute which is applicable to the action here involved. In 92 C.J.S., §7, p. 678, it is said: "In many jurisdictions statutory enactments applicable to actions, whether transitory or local, have rendered the distinction between

these classes of actions of minor importance, or have done away with it entirely." Therefore, whether our action properly belongs to one class or the other, it, nevertheless, must be instituted under the conditions prescribed in the state statute. See State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

However, the courts are in conflict on the question as to whether an action can be brought against a national bank in a state court outside of the county in which the bank is located. U.S. Revised Statute No. 5198, 12 U.S.C. §94, supra, has been differently construed by state courts. A majority of the state courts have held that the provisions of 12 U.S.C. §94, quoted above, do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. See the annotation "National Bank as subject to suit outside [fol. 385f] county of its residence," 86 A.L.R. 47. The courts so holding apparently proceeded on the theory that the use of the word "may" in the statute renders it permissive and not mandatory, and, hence, national banks may be sued in any state court of competent jurisdiction, even though the court is outside of the county in which the bank is located. *Paton's Digest of Legal Opinions*, edited and compiled by the American Bankers Association, under the supervision and direction of Thomas B. Paton, Assistant General Counsel of the Association, Vol. II, p. 2407, et seq. recognizes the rule announced in the case of Curlee v. National Bank of Fayetteville (1924), 187 N.C. 119, 121 S.E. 194, 195, to be against the contention of the banks in the present case. Paton correctly analyzes the Curlee case:

> "In that case it appears that the plaintiffs, residents of Mecklenburg County, North Carolina, sued the defendant, a national bank located in Cumberland County, North Carolina, for alleged damages to the plaintiffs; financial and social standing arising from a wrongful attachment of the plaintiffs' property in Cumberland County. The action was brought in the superior court of Mecklenburg County. The bank thereupon

entered a special appearance, asking for a removal of the case to the superior court of Cumberland County, on the principal ground that, under the federal statute, quoted above, a national bank without its consent is not suable in any state court other than a state court located in the county in which it has its place of business. The court, pointing out that the authorities are conflicting, ruled that the defendant bank's contention was not sustainable.

"The following cases hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against a national bank, located or doing business in another state, or in a district or county other than that in which the action is brought: Fresno Nat. Bank v. Superior Ct., 83 Cal. 491, 24 Pac. 157; Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S.E. 269; Cooke v. State Nat. Bank, 50 Barb. (N.Y.) 339, affirmed in 52 N.Y. 96, 11 Am. Rep. 667; Robinson v. Nat. Bank, 81 N.Y. 385, 37 Am. Rep. 508; Talmage v. Third Nat. Bank, 91 N.Y. 531; Lee v. Citizens' Bank, 5 Ohio Dec. (Reprint) 21; Holmes v. National Bank, 18 S.C. 31, 44 Am. Rep. 558; Montpelier First Natl. Bank v. Hubbard, 49 Vt. 1, 24 Am. Rep. 97; See also, Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N.W. 1019; Cassatt v. First National Bank of West New York, (1931) 9 N.J. Misc. 222, 153 Atl. 377."

[fol. 385g] The rule, as expressed in the above decisions, is sound and is hereby approved and followed. Assuming, as we must in this venue case, that both banks are necessary parties, what would be the result if the two banks (or ten banks) had been domiciled in different counties, and each bank, whether two or ten, had filed a plea of privilege under the federal statute? To invoke the rule insisted upon by the respondents would, in effect, deny the petitioner the right to maintain the suit alleged in his petition. See County of Okeechobee v. Florida National Bank, 150 So. 124 (Fla. 1933).

Among the cases relied upon by respondents is that of First National Bank of Charlotte v. Morgan (1889), 132

U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282. In this case the court definitely stated that the federal venue statute, in force at that time, §57 of the National Bank Act, which was practically the same as 12 U.S.C. §94, quoted above, was mandatory rather than permissive. However, the statement was dicta, and is, therefore, not binding on this court.

One of the principal cases relied upon by the respondents and cited by the Court of Civil Appeals, is that of Leonardi v. Chase National Bank, 81 F. 2d 19, 2nd Cir., certiorari denied 298 U.S. 667. The national bank involved had its principal and central office in the Southern District of New York, and with a branch bank office in Brooklyn in the Eastern District of New York. The court held that the bank's principal place of business was established in the Southern District, and not in the Eastern District, the location of its branch bank; that, therefore, the court in the Eastern District was without jurisdiction. The court in so holding said: " • • • To agree with the interpretation of Sections 51 and 52 of the Judicial Code, as amended (28 U.S.C.A. Nos. 112, 113), in Galveston, H. & S. A. R. Co. v. Gonzales • • • the district in which the national bank has its principal place of business and which contains the place recited in its charter • • • should be taken as the proper district for suits against a national bank." The case of Galveston, Harrisburg & San Antonio Railway Company v. [fol. 385h] in the Leonardi case, supra, as the basis for its holding, was a suit against a railway corporation. There the contention was made that a railway corporation should be considered an inhabitant of the place in which its public office is located, and that the public office of a railroad corporation shall be considered the domicile of such corporation, citing Article 4120, 2 Sayles Texas Civil Statutes. On the other hand, the contention was made that suits against a railway corporation may be brought in any county through or into which the railway of such corporation extends or is operated. The court in holding that the venue of the suit was in the county of its domicile said: " • • • *but it is manifest that, so far as the federal courts are concerned*, this provision (Article 1195, Texas statute) is subordinate to the first section of the Act of 1888, requiring civil suits to be

brought within the district of which the defendant is an inhabitant." (Emphasis added.) Clearly, the court in both the Leonardi and the railway corporation cases, was limiting the scope of its holding to transitory actions commenced against national banks and railway corporations in a federal court.

These cases are not decisive of the paramount question confronting us here. Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice. The respondent banks have been deprived of no constitutional or statutory rights by the bringing of this action in Travis County. That the Congress has never intended to exempt national banks from suits in state courts, established elsewhere than in the county or city in which such banks were domiciled, and that the paramount purpose was to limit the effect of the Act to action against national banks commenced in a federal court is demonstrated by its action in amending the Judiciary Act. See Title 28, Judiciary and Judicial Procedure, 80th Cong. 2d Sess., Vol. 62, part 1, p. 869, Public Laws. When the Act was adopted, it purportedly repealed [fol. 385i] Sec. 4, Chapter 290,[4] which had been a part of the statute since July 12, 1882. A comparison of the provisions of Section 1348, supra, with the provisions of Section 4, Chapter 290, indicates that the former did not actually repeal the latter, but instead reenacted the statute, but in different language. The enactment of Section 4, Chapter 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not mean the repeal of the section of the Banking Act, now designated as Section 94, supra, but indicated the intention of the Congress to limit the Act so as to apply

[4] "The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws or parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

only to actions against a national bank commenced in a federal court.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

Clyde E. Smith, Associate Justice.

Associate Justice Calvert concurs in the result.

Opinion delivered: November 23, 1960.

[fol. 388]

IN THE SUPREME COURT OF TEXAS
AUSTIN

FROM TRAVIS COUNTY, THIRD DISTRICT

No. A-7728

C. H. LANGDEAU, Receiver,

vs.

REPUBLIC NATIONAL BANK OF DALLAS.

ORDERS OVERRULING MOTIONS FOR REHEARING—
December 21, 1960

Respondent's motion for rehearing in the above numbered and entitled cause having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

FROM TRAVIS COUNTY, THIRD DISTRICT

No. A-7729

C. H. LANGDEAU, Receiver,

vs.

MERCANTILE NATIONAL BANK AT DALLAS.

Respondent's motion for rehearing in the above numbered and entitled cause having been duly considered by

the Court, it is ordered that said motion be, and hereby is, overruled.

[fol. 389]

IN THE SUPREME COURT OF TEXAS

No. A-7729

MERCANTILE NATIONAL BANK AT DALLAS, Appellant,

v.

C. H. LANGDEAU, Receiver, Appellee.

NOTICE OF APPEAL BY MERCANTILE NATIONAL BANK AT DALLAS TO THE SUPREME COURT OF THE UNITED STATES—Filed March 16, 1961

I. Notice is hereby given that Mercantile National Bank at Dallas, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Texas affirming the trial court's judgment which had been reversed by the Austin Court of Civil Appeals, such final judgment of the Supreme Court of Texas having been entered December 21, 1960.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 389a]

1. The pleading of C. H. Langdeau, Receiver of ICT Insurance Company, which is designated "Plaintiff's First Amended Original Petition in Cause No. 110,917, and Plaintiff's Original Petition in the Second Numbered Cause (No. 112,113)";

2. Plea of Privilege of Mercantile National Bank at Dallas filed on January 2, 1959;

3. Controverting Affidavit of C. H. Langdeau, plaintiff, filed on January 8, 1959;

4. Order of the trial court entered April 2, 1959, overruling the Plea of Privilege of Mercantile National Bank at Dallas;

5. Agreement Under Rule 378, dated April 13, 1959;

6. Appeal Bond of Mercantile National Bank at Dallas;

7. Judgment of Austin Court of Civil Appeals;

8. Judgment of the Supreme Court of Texas;

9. This Notice of Appeal.

III. The following questions are presented by this appeal:

1. The nature of the rights and privileges conferred on national banks by the provisions of 12 U. S. C. §94;

2. Whether the provisions of 12 U. S. C. §94 are permissive or mandatory;

3. Whether the venue provisions of Section 4(f) of Article 21.28 of the Insurance Code of Texas, Volume 14, of Vernon's Annotated Civil Statutes of Texas, [fol. 389b] or the provisions of 12 U. S. C. §94 control as to actions in state courts in Texas against national banks.

Marvin S. Sloman, Hubert D. Johnson, Of Carrington, Johnson & Stephens, 1700 Mercantile Bank Building, Dallas 1, Texas, Attorneys for Appellant.

Proof of Service (omitted in printing).

[fol. 390]

IN THE SUPREME COURT OF TEXAS

No. A-7728

REPUBLIC NATIONAL BANK OF DALLAS, Appellant,

v.

C. H. LANGDEAU, Receiver, Appellee.

NOTICE OF APPEAL BY REPUBLIC NATIONAL BANK OF DALLAS TO THE SUPREME COURT OF THE UNITED STATES—Filed March 18, 1961

I. Notice is hereby given that Republic National Bank of Dallas, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Texas affirming the trial court's judgment which had been reversed by the Austin Court of Civil Appeals, such final judgment of the Supreme Court of Texas having been entered December 21, 1960.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the [fol. 390a] Supreme Court of the United States, and include in said transcript the following:

1. The pleading of C. H. Langdeau, Receiver of ICT Insurance Company, which is designated "Plaintiff's First Amended Original Petition in Cause No. 110,917, and Plaintiff's Original Petition in the Second Numbered Cause (No. 112,113)";

2. Plea of Privilege of Republic National Bank of Dallas filed on January 3, 1959;

3. Controverting Affidavit of C. H. Langdeau, plaintiff, filed on January 8, 1959;

4. Order of the trial court entered April 2, 1959, overruling the Plea of Privilege of Republic National Bank of Dallas;

5. Agreement Under Rule 378, dated April 13, 1959;

6. Appeal Bond of Republic National Bank of Dallas;

7. Judgment of Austin Court of Civil Appeals;

8. Judgment of the Supreme Court of Texas;

9. This Notice of Appeal.

III. The following questions are presented by this appeal:

1. The nature of the rights and privileges conferred on national banks by the provisions of 12 U.S.C. §94;

2. Whether the provisions of 12 U.S.C. §94 are permissive or mandatory;

3. Whether the venue provisions of Section 4(f) of Article 21.28 of the Insurance Code of Texas, Volume [fol. 390b] 14, of Vernon's Annotated Civil Statutes of Texas, or the provisions of 12 U.S.C. §94 control as to actions in state courts in Texas against national banks.

Neth L. Leachman, Of Leachman, Gardere, Akin & Porter, 1600 Republic National Bank Bldg., Dallas 1, Texas, Attorneys for Appellant.

Proof of Service (omitted in printing).

[fol. 391]

IN THE SUPREME COURT OF TEXAS

No. A-7729

C. H. LANGDEAU, Receiver for I.C.T. INS. Co., Petitioner,

vs.

MERCANTILE NATIONAL BANK AT DALLAS, Respondent,

and

No. A-7728

C. H. LANGDEAU, Receiver for I.C.T. INS. Co., Petitioner,

vs.

REPUBLIC NATIONAL BANK OF DALLAS, Respondent.

STIPULATION IN RE TRANSCRIPT OF THE RECORD FOR TRANSMISSION TO THE SUPREME COURT OF THE UNITED STATES —Filed April 10, 1961

C. H. Langdeau, Receiver, Petitioner, by one of his attorneys of record herein, and Republic National Bank of Dallas, a Respondent, by one of its attorneys of record herein, and Mercantile National Bank at Dallas, a Respondent, by its attorneys of record herein, do each hereby stipulate that the appeal of Mercantile National Bank at Dallas to the Supreme Court of the United States from the judgment of the Supreme Court of Texas dated November 23, 1960 in the above styled and numbered cause and the appeal of Republic National Bank of Dallas from the judgment [fol. 392] of the Supreme Court of Texas also dated November 23, 1960, are each taken from the judgment of the Supreme Court of Texas which determined the same and a single question of law involving the question whether each of the respondent banks were entitled to have a single suit brought by petitioner in the trial court against them and others transferred as to them to Dallas County, Texas for trial; and they each agree that to avoid duplication

it shall be sufficient for the Clerk of the Supreme Court of Texas to prepare a single record for transmission to the Supreme Court of the United States containing all the documents designated by the Mercantile National Bank at Dallas, by the Republic National Bank of Dallas and by C. H. Langdeau, Receiver. However, it is stipulated that Petitioner, Republic National Bank of Dallas, after the judgment of the Supreme Court of Texas sustained the trial Court's decision that this cause should be heard in Travis County, Texas, voluntarily paid its jury fee in the 98th District Court of Travis County, Texas, and requested that the case be put on the jury docket without making said payment and said request subject to an appeal. It is expressly agreed that C. H. Langdeau, Receiver, Petitioner, in joining in this stipulation does not waive or forego his privilege of urging that respondents or either of them have or has waived their or its right of appeal, and does not waive or forego his privilege of urging that respondents have failed to follow the required procedural steps in perfecting an appeal; and said Petitioner does not agree that an appeal may be taken from the existing judgment which [fol. 393] Petitioner contends is interlocutory and not a final judgment in this cause.

W. E. Cureton, Attorney for C. H. Langdeau, Receiver, Petitioner. April 5, 1961

Hubert D. Johnson, Attorney for Mercantile National Bank at Dallas, Respondent. April 6, 1961

Neth L. Leachman, Attorney for Republic National Bank of Dallas, Respondent. April 7, 1961

[fol. 394] Clerk's Certificate (omitted in printing).

[fol. 395]

SUPREME COURT OF THE UNITED STATES

Nos. 90 and 91, October Term, 1961

MERCANTILE NATIONAL BANK AT DALLAS, Appellant,

vs.

C. H. LANGDEAU, Receiver;

and

REPUBLIC NATIONAL BANK OF DALLAS, Appellant,

vs.

C. H. LANGDEAU, Receiver.

Appeals from the Supreme Court of the State of Texas.

ORDER POSTPONING JURISDICTION—October 9, 1961

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of two hours is allowed for oral argument immediately following No. 84.

October 9, 1961.

Mr. Justice Clark took no part in the consideration or decision of these cases.

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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 14

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER,
Appellee.

On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No.

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER,
Appellee.

On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of Texas which reversed the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas and affirmed the judgment of the trial court, the 98th District Court in and for Travis County, Texas. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is reported at 341 S. W. 2d 161 (Tex., 1960). A copy of this opinion is reprinted herewith as Appendix A. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, known as the Austin Court of Civil Appeals, is reported at 331 S. W. 2d 349 (Tex. Civ. App., 1960). A copy of such opinion is reprinted herewith as Appendix B. Copies of the judgment of the trial court, the judgment of the Austin Court of Civil Appeals, and the judgment of the Supreme Court of Texas are reprinted herewith as Appendix C.

JURISDICTION

In 1958 Appellee as Receiver of ICT Insurance Company sued Appellant Mercantile National Bank at Dallas, Republic National Bank of Dallas, and some 242 other defendants. The suit, a tort action for damages, was brought in the 98th District Court of Travis County, Texas, the state court in which the delinquency proceeding against said ICT Insurance Company was pending. Appellant Mercantile National Bank at Dallas, a national bank located at Dallas, Texas, filed a plea of privilege* asserting its claim that as a national bank located at Dallas, Texas it was entitled to be sued in Dallas, Texas under the federal statute relating to venue of actions against national banks. Said Republic National Bank of Dallas filed a similar plea of privilege. Appellee filed a controverting plea to such pleas of privilege,

*The required plea under Texas law and procedure as to change of venue. Rule 86, Texas Rules of Civil Procedure.

claiming the right to maintain such action in the state court in Travis County, Texas against the said two national banks located at Dallas, Texas on the basis of a Texas statute contained in Section 4(f) of Article 21.28 of the Insurance Code of Texas.

Pursuant to Texas practice and procedure a separate hearing and trial was held on such venue right, and by agreement the venue rights of both said national banks were heard and adjudicated in a consolidated trial or hearing. The trial court overruled said pleas of privilege urged by Appellant and by said Republic National Bank of Dallas. Both national banks duly appealed from said trial court's judgments to the Austin Court of Civil Appeals, which intermediate court of appeals consolidated the appeals and disposed of them in a single opinion. In such opinion the Austin Court of Civil Appeals sustained the contentions of the two national banks and entered judgments overruling the contrary judgments of the trial court. Appellee appealed therefrom to the Supreme Court of the State of Texas, which consolidated the cases and disposed of them in a single opinion. The Supreme Court of Texas reversed the judgments of the Austin Court of Civil Appeals and entered judgments affirming the prior judgments of the trial court. Appellant and said Republic National Bank of Dallas duly filed motions for rehearing, and such motions for rehearing were overruled on December 21, 1960. Appellant duly filed its Notice of Appeal with the Clerk of the Supreme Court of Texas on March 16, 1961. Said Repub-

lic National Bank of Dallas filed its Notice of Appeal on March 18, 1961.

Jurisdiction of this appeal is conferred by Section 1257(2) of Title 28 of the United States Code. The judgment by the Supreme Court of the State of Texas is a judgment "rendered by the highest court of a State in which a decision could be had." The entry of the order overruling Appellant's motion for rehearing marked the end of appellate review in Texas on the matter of Appellant's asserted federal venue right involved. The opinions of the Austin Court of Civil Appeals and of the Supreme Court of the State of Texas clearly showed that the question involved was that of whether the Texas statute was repugnant to the federal statute relating to venue of actions against national banks and that the Supreme Court of the State of Texas held in favor of the validity and applicability of the state statute notwithstanding the express provisions of the federal statute on the subject. The only remaining question relates to the meaning and intepretation of the word "final" as it appears in Section 1257(2) of Title 28 of the United States Code.

This Court has held that in determining the existence or non-existence of finality the test is whether "the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking, State of Nebraska v. Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. ed. 254 (1942); *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428, 91 L. ed. 1662 (1947). In the

instant case the Supreme Court of the State of Texas has in fact fully adjudicated rights and such adjudication is not subject to further review by the Texas courts.

In the present case Appellee and the two national banks stipulated and agreed that "the only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants (the two banks) to have said Plaintiff's (Appellee's) action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action were controlling." From the record as a whole and this stipulation and agreement in particular it is quite apparent that in the present case this is the only Federal question that could come to this Court and that it has been finally adjudicated by the highest court in Texas. This Court's assumption of jurisdiction in the present case would not be "to allow review of an intermediate objection" which would "offend the decisive objection to fragmentary reviews." *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092 (1945).

Under Texas practice and procedure the ruling on the pleas of privileges is treated as final insofar as it disposes of the issue as to the venue of the case and such ruling has a sufficient element of finality to support a plea of res judicata. *Wichita Falls & S. R. Co. v. McDonald*, 174 S. W. 2d 951 (Tex., 1943). In any further proceedings in the state courts in Texas the finality of the ruling will be fully recognized. A failure to appeal from a trial court's order on

a plea of privilege would be a "waiver of any right to thereafter complain of the same." *Smith Bros. Grain Co. v. Windsor & Stanley*, 255 S. W. 158 (Tex. Com. App., 1923, opinion adopted by Texas Supreme Court). The state law as to the nature and effect of the judgment is highly material insofar as it reveals the incidents and effect of the judgment in its local context.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. ed. 1528 (1949) this Court had occasion to construe the meaning of the word "final" as it appears in Section 1291 of Title 28 of the United States Code. There this Court stated it "has long given this provision of the statute this practical rather than a technical construction." In declining to delay the assumption of jurisdiction this Court pointed out that "when that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." Such practical observations are particularly appropriate in the present case where the right asserted is the right to require that Appellee's action against Appellant be tried in Dallas, Texas rather than in Austin, Travis County, Texas. From a practical standpoint it does not appear to be just or necessary to require that Appellant lose the benefit of its claimed federal right in order for it to arrive ultimately at a point where it can get from the Texas courts to this Court for a determination of whether or not such "lost right" had existed.

The federal right involved in the present case will not be involved in any subsequent proceedings in this cause. As in

Cohen v. Beneficial Industrial Loan Corp., supra, this case involves a "final disposition of a claimed right which is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." The present case is thus different from temporary injunction cases in which the same factual and legal issues would be presented in the subsequent trial or subsequent appeal. Appellate review at the temporary injunction stage would involve piecemeal and fragmentary review. *Montgomery Building & Const. Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178, 73 S. Ct. 196, 97 L. ed. 204 (1952).

STATUTES INVOLVED

The Texas statute involved in this case is Section 4(f) of Article 21.28 of the Insurance Code of Texas, as amended in 1955. Acts 1955, 54th Leg., p. 737, ch. 267. The text of such statutory provision is reprinted herewith in Appendix D. The federal statute here involved is Section 1 of Chapter 80 of the Act of February 18, 1875, 18 Stat. 320, appearing as Section 94 of Title 12 of the United States Code. The text of such federal statutory provision is reprinted herewith in Appendix D.

QUESTIONS PRESENTED

I. The nature of the rights and privileges conferred on national banks by the provisions of Section 94 of Title 12 of the United States Code.

II. Whether the provisions of said Section 94 of Title 12 of the United States Code are permissive or mandatory.

III. Whether the provisions of Section 4(f) of Article 21.28 of the Insurance Code of Texas or the provisions of said federal statute control as to actions in state courts in Texas against national banks.

STATEMENT OF THE CASE

The pleadings in this case showed clearly that the action is a tort action to recover damages, that Appellant is a national bank located in Dallas, Dallas County, Texas and that Appellee is seeking to maintain the action in a state court in a state district court in and for Travis County, Texas, Appellant not being located in or having a place of business in said Travis County, Texas. By proper pleading duly filed Appellant asserted its claimed right under the federal statute on national banks, 12 U. S. C. §94, to be sued in Dallas, Dallas County, Texas, which asserted right Appellee duly contested. After trial and hearing on April 2. 1959 the trial court refused to recognize such right which Appellant had urged. Appellant duly appealed from such judgment of said trial court, and in connection with such appeal Appellant and Appellee stipulated that "the only issue involved * * * was the issue of whether the provisions of the federal statutes entitled said Defendants (Appellants) to have said Plaintiff's (Appellee's) action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action were controlling." On December 9, 1959 the Austin Court of Civil Appeals entered judg-

ment sustaining Appellant's contention. The opinion of the Austin Court of Civil Appeals followed this Court's construction of the federal statute involved as it had been construed in *First National Bank of Charlotte v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 33 L. ed. 282 (1889).

Appellee duly applied to the Supreme Court of Texas for a writ of error, which application was granted by the Supreme Court of Texas. On November 23, 1960 the Supreme Court of the State of Texas entered its judgment reversing the judgment of the Austin Court of Civil Appeals and affirming the judgment of the trial court. The opinion of the Supreme Court of the State of Texas proceeded on the theory that the federal statute was merely permissive, that the state statute was controlling, and that what the Supreme Court of the United States had said about the federal statute in *First National Bank v. Morgan*, supra (1889) was mere dictum and not controlling. Appellant duly filed its motion for rehearing, and the judgment of the Supreme Court of the State of Texas denying Appellant's asserted federal right became final on December 21, 1960, when such motion for rehearing was overruled.

RAISING THE FEDERAL QUESTIONS

Appellant's initial pleading, a plea of privilege, clearly and expressly asserted the federal right claimed under the federal statute, 12 U. S. C. §94. Appellee's responsive pleading clearly raised the contention that the state statute rather than the federal statute was controlling. The

stipulation between Appellant and Appellee in connection with the appeal contained the agreement of the parties that the *only* issue involved was that of whether the federal statute or the state statute was controlling. The published opinion of the Austin Court of Civil Appeals showed that this was the *only* issue involved. The published opinion of the Supreme Court of the State of Texas showed that this was the only issue involved. The federal questions were presented at the earliest stage and never waived.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The right granted to national banks by the federal statute, 12 U. S. C. §94, is a valuable right which applies to actions against national banks whether brought in federal courts or in state courts. This statutory right is not merely permissive either in federal courts or in state courts. It has been passed on and upheld by the Supreme Court of the United States in the following cases: *Casey v. Adams*, 102 U. S. 66, 26 L. ed. 52 (1880); *First National Bank of Charlotte v. Morgan*, supra, the latter case being cited with approval in *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594 (1922). The decisions in federal and state courts are thoroughly reviewed in *Monarch Wine Co. v. Butte*, 249 P. 2d 291 (Cal. App., 1952).

From 1864 to the present national banks have been highly important units of our banking system in this country. Problems of the extent to which they are governed and controlled by state laws have presented and will con-

tinue to present federal questions of substantial interest to the banking systems and general economy in this country. State legislatures cannot take away from national banks rights and immunities conferred on national banks by Congress.

This Court's decision in *First National Bank of Charlotte v. Morgan*, supra, decided in 1889, unequivocally characterized the right granted to national banks by the statute as an "immunity", an "exemption", and a "privilege". Notwithstanding this, however, some state courts have not followed the construction of the federal statute announced by this Court in the *Morgan* case in 1889. See the compilation of cases contained in an annotation in 86 A. L. R. 47 (1933). In the present case the Supreme Court of the State of Texas has held what this Court said in the *Morgan* case was mere dictum and not controlling. Relying on Section 4 of the Act of July 12, 1882 (22 Stat. 163), which was not applicable in the *Morgan* case, the Michigan Supreme Court thought that this Act of July 12, 1882 did repeal in whole or in part the earlier federal statute on venue, *Levitan v. Houghton Nat. Bank*, 174 Mich. 566, 140 N. W. 1019 (1913). A current decision by this Court on these questions is in the public interest and is of great importance to national banks concerned with their rights in state court proceedings against them.

Question One

In *First National Bank of Charlotte v. Morgan*, supra, this Court described the right granted by the federal stat-

ute here involved as an "exemption" granted by Congress and as an "immunity from suit", and concluded if such exemption or immunity from suit had been claimed in the trial court it "must have been recognized." These statements and conclusions were not mere dictum.

Question Two

The provisions of the federal statute, 12 U. S. C. §94, are mandatory and not merely permissive. *First National Bank of Charlotte v. Morgan*, supra; *Buffum v. Chase Nat. Bank of City of New York*, 192 F. 2d 58 (7th C.C.A., 1951, certiorari denied in 242 U. S. 994, 1952). In the present case the Supreme Court of Texas based its conclusion that the federal statute in question was merely permissive on the North Carolina case of *Curlee v. National Bank*, 121 S. E. 194 (N. C., 1924). That North Carolina case, decided in 1924, followed earlier New York cases including *Cooke v. State Nat. Bank*, 50 Barb. 339 (1867), affirmed in 52 N. Y. 96 (1873). In *Raiola v. Los Angeles First Nat. Trust & Savings Bank*, 233 N. Y. S. 301, decided in 1929, the New York court on the basis of the decision of the Supreme Court of the United States in *First National Bank of Charlotte v. Morgan*, supra, decided after the earlier New York cases, reversed the earlier New York cases on this question. To hold that the federal statute is merely permissive is to hold that it is meaningless. The right under it is not an exemption or immunity if a court can recognize it or not as it sees fit.

Question Three

By its terms the provisions of 12 U. S. C. §94 apply to actions and proceedings in federal courts and in state courts. In *First National Bank of Charlotte v. Morgan*, supra, this Court proceeded on the assumption that the statute did apply to an action against a national bank in a state court in North Carolina. The conclusion of the Supreme Court of the State of Texas in the present case to the effect that "this is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as from the application of federal venue statutes" overlooks completely the fundamental premise that Congress could have provided that actions against national banks could be brought only in federal courts. *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416, 37 S. Ct. 734, 61 L. ed. 1233 (1916). The theory that the federal statute has no application to actions in state courts, that states can legislate as to national banks without reference to the federal nature of such banks and the express federal statutes relating to them, and that such state enactments are "insulated from federal judicial review, must be based on a misconception as to the relations between state legislatures and Congress insofar as national banks are concerned. If the federal statute is otherwise applicable, it cannot be changed by a state statute.

CONCLUSION

This appeal brings before this Court substantial federal questions of vital interest to all national banks and to the general public insofar as actions and proceedings against national banks are concerned. This Court has not directly considered these federal questions since 1889, and subsequent state court decisions have created areas of doubt. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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HUBERT D. JOHNSON,

Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12 day of May, 1961, I served copies of the foregoing Jurisdictional Statement on the Appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee at the following post office addresses:

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Counsel for Appellant.

APPENDIX A

Opinion of the Supreme Court of the State of Texas

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Republic National Bank of Dallas, Respondent.

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Mercantile National Bank at Dallas, Respondent.

Nos. A-7728, A-7729.

Supreme Court of Texas.

Nov. 23, 1960.

Rehearing Denied Dec. 21, 1960.

Cecil C. Rotsch, Austin, Keith, Mehaffy, McNicholas & Weber, Beaumont, Cureton & Lanham, Waco, for C. H. Langdeau.

Dan Moody, Austin, Leachman, Gardere, Akin & Porter, Dallas, for Republic Nat. Bank of Dallas.

Carrington, Johnson & Stephens, Dallas, for Mercantile Nat. Bank at Dallas.

SMITH, Justice.

These venue cases present but a single question of law which may be disposed of in one opinion.

[1] The question presented is: Does Title 12 U.S.C.A. § 94,[1] give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f)[2] of the Insurance Code, the right to have an action against it tried in the county of its domicile?

The Court of Civil Appeals in its opinion reported in Vol. 331 S. W. 2d 349, answered the question in the affirmative. The opinion, in effect, sustained the bank's position: (1) that federal statutes are paramount on matters affecting such federal instrumentalities as national banks, and that state statutes in conflict therewith must yield to the federal statutes, and (2) that the decisions of United States courts involving the construction of federal statutes relating to national banks are binding on state courts and that the state venue statutes are not applicable.

---

[1] "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases. Sec. 94, Title 12, U. S. Code, annotated.

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348."

[2] "New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The record reveals that delinquency proceedings were filed in the 98th District Court against I.C.T. Insurance Company and petitioner, C. H. Langdeau, was appointed receiver under the provisions of Section 2(a) of Article 21.28, supra, of the Insurance Code.

Thereafter, petitioner instituted this suit against a number of defendants, including the two respondent national banks, charging a conspiracy to defraud the insurance company, its policyholders, stockholders, and creditors, and sought a judgment against all defendants, jointly and severally. In effect, it is a suit for the recovery of assets of the delinquent insurance company. In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed.

[2] The respondents' pleas of privilege to be sued in Dallas County, Texas, the county of the residence and location of each banks, were overruled by the trial court, but sustained by the Court of Civil Appeals as already stated. We deem it necessary to take note of the respondents' challenge to the jurisdiction of this court, which is to the effect that when, as here, a conflict of decisions is made the basis of Supreme Court jurisdiction, it is essential that such conflict appear on the face of the opinions themselves, and that petitioner has failed to meet such test. This test is laid down in the case of State v. Wynn, 157 Tex. 200, 301 S. W. 2d 76. We believe that the decision in the present case is sufficiently in conflict with the decision in the

case of Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, er. dism. to give this court jurisdiction.

In the case of Guerra v. Lemburg, supra, the Commercial State Bank of Sinton, San Patricio County, Texas, and the City National Bank of Corpus Christi, Nueces County, Texas, were sued in Hidalgo County, the residence of a co-defendant. The National Bank of Corpus Christi filed a plea of privilege to be sued in its home county claiming, as the respondents claim in the present case, that under the provisions of 12 U.S.C.A. § 94, a national bank can only be sued in a state court in the county of its domicile, regardless of the fact that under the provisions of the Texas venue statutes, the suit could have been brought in Hidalgo County where alleged fraudulent representations were made. The trial court sustained the plea of privilege. The Court of Civil Appeals reversed, holding that the bank was not entitled to a change of venue,[3] thereby holding directly opposite to the holding in the present case. The

[3]Quote from Guerra v. Lemburg, supra [22 S. W. 2d 337]:

"In * * * (28 U.S.C.A. § 41(16) [1948 Rev., 28 U.S.C.A. § 1348]), national banks are declared to be, for the purposes of all other actions except those enumerated, against or by them, for property, * * *, and suits in equity, citizens of the states in which they are respectively located. Being citizens of a state carries with such citizenship the burdens, as well as the privileges, pertaining to it. This is provided in * * * (12 U.S.C.A. § 24(4), as to national banks, where they are given the power 'to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.'

"In conferring jurisdiction generally upon state courts in regard to suits against national banks, * * * the provision in question is embodied * * * under the head 'Usurious Interest' (12 U.S.C.A. §§ 86, 94), showing conclusively that no provision preventing national banks from being sued in state courts, under any and all other circumstances, in any other than the county of the domicile is in existence. The provision has reference alone to actions for penalties arising from usuary, which is legislated against in the paragraph cited. The law does not apply to any other class of actions, and in all other suits national banks are citizens of the state in which they are located, clothed with the privileges of citizenship, and subject to any burdens and liabilities attached thereto."

Court of Civil Appeals in the present case quotes at length from the case of Monarch Wine Company v. Butte, 1952, 113 Cal. App. 2d 833, 249 P. 2d 291. That case refers to the case of Guerra v. Lemburg, supra, and the case of Leonardi v. Chase National Bank of City of New York, 2 Cir., 81 F. 2d 19. The Court of Civil Appeals cites this latter case in support of its holding that the federal statute controls. The Monarch Wine Company case, supra, held that the decision in the Guerra v. Lemburg case, supra, is contrary to the decision in Leonardi, supra, and the opinion of the Court of Civil Appeals in the present case holds that the Guerra case was erroneously decided, and that it agrees with the Leonardi case. We are convinced that the specific conflicting holdings in the two cases create a jurisdictional conflict. The holdings are so far upon the same state of facts that the decision of one of the cases is necessarily conclusive of the decision in the other. See Dockum v. Mercury Ins. Co., 134 Tex. 437, 135 S. W. 2d 700. Accordingly, the application for writ of error presents a case within the jurisdiction of this court.

We now proceed to a decision of the principal question. We have concluded to reverse the judgment of the Court of Civil Appeals and affirm that of the trial court for the reasons now to be stated.

If, under federal decisions, United States Revised Statute § 5198, 12 U.S.C.A. § 94, is applicable here, then all state statutes in conflict therewith must yield. See Van Reed v. Peoples National Bank, 198 U. S. 554, 25 S. Ct. 775, 49 L. Ed. 1161; Citizens National Bank of Stamford

v. Stevenson, Tex. Com. App., 231 S. W. 364. We agree that the issue here also is not one of jurisdiction, but is one as to proper venue, or proper locality where a state statute has fixed venue. However, we do not agree with respondents' contention that the proper venue of this action is determined by Section 94 of 12 U.S.C.A., supra. See Casey v. Adams, 1880, 102 U. S. 66, 68, 26 L. Ed. 52. The proper venue of this case is determined by Article 21.28, § 4(f), supra, which provides, in effect, that the court of competent jurisdiction of the county in which the delinquency proceedings are pending shall have venue to hear and determine all actions or proceedings instituted after the commencement of the delinquency proceedings.

[3] It was not the intention of the Congress in adopting 12 U.S.C.A. § 94, supra, that it was to control with respect to an action against a national bank commenced in a state court, especially where such action was commenced in a district court located in the county designated by state statute to have venue. This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes. It is unnecessary to our decision to determine whether this particular action is local or transitory in nature. Texas has adopted Article 21.28, supra. This is the statute which is applicable to the action here involved. In 92 C.J.S. Venue § 7, p. 678, it is said: "In many jurisdictions statutory enactments applicable to actions whether transitory or local, have rendered the distinction between these classes of

actions of minor importance, or have done away with it entirely." Therefore, whether our action properly belongs to one class or the other, it, nevertheless, must be instituted under the conditions prescribed in the state statute. See State ex rel. Gardner v. Hall, 282 Mo. 425, 221 S. W. 708.

However, the courts are in conflict on the question as to whether an action can be brought against a national bank in a state court outside of the county in which the bank is located. U. S. Revised Statutes § 5198, 12 U.S.C.A. § 94, supra, has been differently construed by state courts. A majority of the state courts have held that the provisions of 12 U.S.C.A. § 94, quoted above, do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. See the annotation "National Bank as subject to suit outside county of its resident," 86 A.L.R. 47. The courts so holding apparently proceeded on the theory that the use of the word "may" in the statute renders it permissive and not mandatory, and, hence, national banks may be sued in any state court of competent jurisdiction, even though the court is outside of the county in which the bank is located. Paton's Digest of Legal Opinions, edited and compiled by the American Bankers Association, under the supervision and direction of Thomas B. Paton, Assistant General Counsel of the Association, Vol. II, p. 2407 et seq., recognizes the rule announced in the case of Curlee v. National Bank of Fayetteville, 1924, 187 N.C. 119, 121 S.E. 194, 195, to be against the contention of the banks in the present case.

Paton correctly analyzes the Curlee case: "In that case it appears that the plaintiffs, resident of Mecklenburg County, North Carolina, sued the defendant, a national bank located in Cumberland County, North Carolina, for alleged damages to the plaintiffs; financial and social standing arising from a wrongful attachment of the plaintiffs' property in Cumberland County. The action was brought in the superior court of Mecklenburg County. The bank thereupon entered a special appearance, asking for a removal of the case to the superior court of Cumberland County, on the principal ground that, under the federal statute, quoted above, a national bank without its consent is not suable in any state court other than a state court located in the county in which it has its place of business. The court, pointing out that the authorities are conflicting, ruled that the defendant bank's contention was not sustainable.

"The following cases hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against national bank located or doing business in another state, or in a district or county other than that in which the action is brought; Fresno Nat. Bank v. Superior Ct., 83 Cal. 491, 24 P. 157; Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S.E. 269; Cooke v. State Nat. Bank, 50 Barb. (N.Y.) 339, affirmed in 52 N.Y. 96, 11 Am.Rep. 667; Robinson v. National Bank, 81 N.Y. 385, 37 Am.Rep. 508; Talmage v. Third Nat. Bank, 91 N.Y. 531; Lee v. Citizens' Nat. Bank, 5 Ohio Dec. Reprint 21; Holmes v. National Bank, 18 S.C. 31, 44 Am. Rep. 558; Montpelier First Nat. Bank v. Hubbard, 49

Vt. 1, 24 Am.Rep. 97. See also, Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N.W. 1019; Cassat v. First National Bank of West New York, 1931, 9 N.J.Misc. 222, 153 A. 377."

The rule, as expressed in the above decisions, is sound and is hereby approved and followed. Assuming, as we must in this venue case, that both banks are necessary parties, what would be the result if the two banks (or ten banks) had been domiciled in different counties, and each bank, whether two or ten, had filed a plea of privilege under the federal statute? To invoke the rule insisted upon by the respondents would, in effect, deny the petitioner the right to maintain the suit alleged in his petition. See County of Okeechobee v. Florida National Bank, 1933, 112 Fla. 309, 150 So. 124.

[4] Among the cases relied upon by respondents is that of First National Bank of Charlotte v. Morgan, 1889, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282. In this case the court definitely stated that the federal venue statute in force at that time, § 57 of the National Bank Act, 13 Stat. 99, which was practically the same as 12 U.S.C.A. § 94, quoted above, was mandatory rather than permissive. However, the statement was dicta, and is, therefore, not binding on this court.

One of the principal cases relied upon by the respondents, and cited by the Court of Civil Appeals, is that of Leonardi v. Chase National Bank, 2 Cir., 81 F. 2d 19, 22, certiorari denied 298 U. S. 667, 56 S. Ct. 941, 80 L. Ed. 1398. The national bank involved had its principal and central office in the Southern District of New York, and with a branch

office in Brooklyn in the Eastern District of New York. The court held that the bank's principal place of business was established in the Southern District, and not in the Eastern District, the location of its branch bank; that, therefore, the court in the Eastern District was without jurisdiction. The court in so holding said: "* * * To agree with the interpretation of Sections 51 and 52 of the Judicial Code, as amended (28 U.S.C.A. §§ 112, 113 [1948 Rev., 28 U.S.C.A. §§ 1391, 1392, 1401, 1693, 1695]), in Galveston, H. & S. A. R. Co. v. Gonzales * * * the district in which the national bank has its principal place of business and which contains the place recited in its charter * * * should be taken as the proper district for suits against a national bank." The case of Galveston, Harrisburg & San Antonio Railway Company v. Gonzales, 151 U. S. 496, 14 S. Ct. 401, 404, 38 L. Ed. 248, cited in the Leonardi case, supra, as the basis for its holding, was a suit against a railway corporation. There the contention was made that a railway corporation should be considered an inhabitant of the place in which its public office is located, and that the public office of a railroad corporation shall be considered the domicile of such corporation, citing Article 4120, 2 Sayles Texas Civil Statutes. On the other hand, the contention was made that suits against a railway corporation may be brought in any county through or into which the railway of such corporation extends or is operated. The court in holding that the venue of the suit was in the county of its domicile said: "* * * *but it is manifest*

that, so far as the federal courts are concerned, this provision (Article 1195, Texas statute) is subordinate to the first section of the act of 1888, requiring civil suits to be brought within the district of which the defendant is an inhabitant." (Emphasis added.) Clearly, the court in both the Leonardi and the railway corporation cases, was limiting the scope of its holding to transitory actions commenced against national banks and railway corporations in a federal court.

[5] These case are not decisive of the paramount question confronting us here. Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice. The respondent banks have been deprived of no constitutional or statutory rights by the bringing of this action in Travis County.

That the Congress has never intended to exempt national banks from suits in state courts, established elsewhere than in the county or city in which such banks were domiciled, and that the paramount purpose was to limit the effect of the Act to action against national banks commenced in a federal court is demonstrated by its action in amending the Judiciary Act. See Title 28, Judiciary and Judicial Procedure, 80th Cong. 2d Sess., Vol. 62, part 1, p. 869, Public Laws, U. S.Code Cong.Service 1948, pp. A165-A198. When the Act was adopted, it purportedly repealed

Sec. 4, Chapter 290, 22 Stat. 163,[4] which had been a part of the statute since July 12, 1882. A comparison of the provisions of Section 1348, supra, with the provisions of Section 4, Chapter 290, indicates that the former did not actually repeal the latter, but instead reinacted the statute, but in different language. The enactment of Section 4, c. 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not mean the repeal of the section of the Banking Act, now designated as Section 94, supra, but indicated the intention of the Congress to limit the Act so as to apply only to actions against a national bank commenced in a federal court.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

CALVERT, J., concurs in the result.

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[4] "The jurisdiction for suits hereafter brought by or against any association, established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdictions for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws or parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

APPENDIX B

Opinion of the Austin Court of Civil Appeals

NO. 10,711
AND
NO. 10,712

MERCANTILE NATIONAL BANK AT DALLAS
AND
REPUBLIC NATIONAL BANK OF DALLAS,
APPELLANTS

v

C. H. LANGDEAU, RECEIVER, APPELLEE

FROM DISTRICT COURT OF TRAVIS COUNTY,
98TH JUDICIAL DISTRICT, NO. 110,917,
HONORABLE D. B. WOOD, JUDGE

These are venue cases in which the parties have stipulated to the controlling facts and issues.

The controlling facts are that the appellants, Mercantile National Bank at Dallas and the Republic National Bank of Dallas, are, and were at all material times, national banking associations organized and existing under the laws of the United States of America (National Bank Act) with each having its principal and only place of business in Dallas, Dallas County, Texas, and appellee, C. H. Langdeau, Receiver (and his predecessors),[1] was at all such times the duly

[1]The history of prior receivers is stipulated but is not material.

appointed, qualified and acting Receiver for and had taken charge of all the assets of ICT Insurance Company in receivership proceedings in the 98th District Court of Travis County, a court of competent jurisdiction, and who had been designated as Liquidator for such company by the Board of Insurance Commissions of Texas and who, under the laws and orders of the 98th District Court was authorized to maintain this action for the alleged wrongful acts committed by appellants against ICT Insurance Company.[2]

The question of law presented was stipulated to be:

> "The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said plaintiffs' action against them transferred to the state court in Dallas County, Texas, or whether state statutes on venue of such action are controlling."

The federal statutes referred in this stipulation are, and we quote them:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Sec. 94, Title 12, U. S. Code, Annotated.[3]

> "The district courts shall have original jurisdiction of any civil action commenced by the United States,

[2]The detailed nature of this suit is not material to these appeals except to state that it is a suit for damages based on an alleged conspiracy.

[3]This section is a part of Chapter 2 of Title 12 of the United States Code, Annotated. Title 12 is entitled: "Banks and Banking." Chapter 2 of said Title, in which is included Section 94, is entitled "National Banks," Section 94 is entitled "Venue of Suits."

or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348.[4]

The State statute referred to is Section 21.28, Sub-section 4(f) of the Texas Insurance Code, which we quote:

"New Lawsuits. The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

There can be no doubt that if venue of these cases is fixed in Dallas by Federal laws the State statute is of no avail. We quote from Van Reed v. People's National Bank, 198 U. S. 554, 25 S. Ct. 775:

"National banks are quasi-public institutions, and, for the purpose for which they are instituted, are national in their character and within constitutional limits subject to the control of Congress, and are not to be interfered with by State legislative or judicial

[4]This Section is a part of Chapter 85 of Title 28 of the United States Code, Annotated. Title 28 is entitled: "Judiciary and Judicial Procedure." Chapter 85 of said Title, in which is included Section 1348 is entitled: "District Courts, Jurisdiction." Section 1348 is entitled: "Banking Association as Party."

> action, except so far as the law making power of the government may permit."

In Citizens National Bank of Stanford v. Stevenson, 231 S. W. 364, Tex. Comm. of Appeals (opinion by Judge Powell) it is stated:

> "It is well settled that, if the federal and state provisions upon any point with reference to national banks, conflict, the state rules must yield."

Mr. Justice Hart, in Paddock v. Siemoneit, 147 Tex. 571, 218 S. W. 2d 428, stated this rule for construing Federal statutes:

> "In determining the meaning of Federal laws, this Court is controlled by the decisions of the Supreme Court of the United States. * * * In this instance, however, there does not appear to be any decisions by the United States Supreme Court which is directly in point, and we have to try to arrive at the meaning of the statute from that Court's opinions in more or less analogous cases."

We will now undertake a determination of the question presented from the decided cases of the United States Supreme Court either directly in point or "from that Court's opinions in more or less analogous cases."

For a better understanding of these opinions we give the following condensed history of Section 94 of Title 12, supra:

The Act of June 3, 1864, known as the National Bank Act (13 Stat. 99) contained the following as a part of Section 57:

> "Suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held

within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In the Revised Statutes of the United States, enacted in 1873, there was no statute comparable to Section 57 of the National Bank Act of June 3, 1864. This omission was remedied by the Act of February 18, 1875 (18 Stat. 316, 320) which added a statute identical with present Section 94, Title 12.

When the corrective legislation of 1875 was enacted however it was as an amendment, by addition, to Section 5198 of the 1873 revision of the United States statutes, which Section dealt only with penalties for charging usurious interest. These provisions were separated in the United States Code adopted June 1926 and the provision relating to penalties was given Section number 86 and the provision as to venue was given Section number 94.

No other changes were or have been made in Section 94.

The predecessor of Section 94 was construed by the United States Supreme Court in First National Bank of Charlotte, North Carolina v. Morgan, 132 U. S. 141, U. S. S. Ct. Rep. 282 (1889). There a national bank was sued in a State Court in a county other than the one in which it was located. No objection on this account was made until the case reached the State Supreme Court. In holding that the privilege of being sued in its home county could be waived by the bank

the United States Supreme Court, Mr. Justice Harlan speaking, said:

"This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in this business that might result from their books sent to distant counties in obedience to process from state courts. First Nat. Bank of Bethel v. Pahquioque Nat. Bank, 81 U. S. 14 Wall. 383, 394 (20:840, 842); Crocker v. Marine Nat. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immuntiy granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in

which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

In Cope v. Anderson, 331 U. S. 461, 67 S. Ct. 1340 (1947) a receiver of an insolvent Kentucky national bank brought suit in Federal District Courts in Ohio and Pennsylvania to enforce stockholders' assessments against Ohio and Pennsylvania stockholders. The question was whether Kentucky statutes of limitation or limitation statutes of Ohio and Pennsylvania controlled. In holding that the cause of action arose in Kentucky and its statutes applied, the Court, Mr. Justice Black speaking, stated:

"Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U.S.C.A., Sections 30, 33, 34a, 36, 51, 62, 72, 4 F.C.A., Title 12, Sections 30, 33, 34a, 36, 51, 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the State in which it is established or located, 28 U.S.C.A., Sec. 51(16), 7 F.C.A. Title 28, Sec. 41(16), and in that district alone can it be sued. 12 U.S.C.A., Sec. 94, 4 F.C.A. Title 12, Sec. 94."

The one United States Supreme Court case upon which appellees rely is Casey, Receiver v. Adams, 102 U. S. 68, 26 L. Ed. 52 (1880).[5] There proceedings were taken against a national bank in a State court in a parish other than the one in which it was located, in or as a result of a suit to foreclose a mortgage on land. The suit was brought in and

[5] Appellants do cite and quote the following from Bank of America v. Whitney Central National Bank, 261 U. S. 171, 67 L. Ed. 594:

"Whether a national bank could under any circumstances, be subjected, without its consent, to a suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

the proceedings held in the parish in which the land was situated. The bank objected that it could be sued only in the county of its location. In an opinion delivered by Mr. Chief Justice Waite, the Court held:

> "The federal question in this case is, whether a national bank can be sued in a state court in a local action in any other county or city than that where the bank is located. By sec. 5198, R.S., it is provided that 'Suits, actions and proceedings against any association under this title (the National Banks) may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.' This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the Act of Congress the construction now contended for, would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

> "The proceeding in this case was clearly local in its nature. It related to property in the Parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until 'a conflict of privileges' arising between creditors was settled."

We agree with appellee that Art. 21.28, Section 4(f), V.A.C.S. creates a statutory local action. We do not agree that such actions are necessarily local in nature as that term was used by the Supreme Court in Casey against Adams. This action, a suit for damages for alleged malfeasance, is by no stretch of the imagination local in nature or in character. Morris v. Mo. Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228; Miller v. Howell, 234 S. W. 925, Ft. Worth Court of Civil Appeals.

This, to our satisfaction, distinguishes Casey against Adams and prevents it from being a case directly in point. We are convinced, too, that Casey does not represent the law as reflected by subsequent United States Supreme Court decisions, supra. Those decisions, in our opinion, fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94.

Appellee does not discuss the Federal District and Circuit Court decisions cited by appellants and disposes of them by saying:

> "Decisions by the U. S. Circuit Courts and decisions by the U. S. District Courts in suits filed in Federal Courts have no bearing and are unrelated to the ques-

> tion because State Venue Statutes do not control or purport to govern the venue of such suits."

Appellee does, however, cite nine State cases,[6] each from a separate State in support of its position. These cases (one or more) are to the effect that Section 94 applies (1) only in usury cases (2) in transistory cases or (3) that it is permissive (4) that it was repealed by Section 1348, supra, or (5) as stated by the New Jersey Supreme Court in Cassatt:

> "We are inclined to think that the direct application of the statute is to jurisdiction and that it is not in such potent control of venue as to be imperative in the present case."

The Federal District and Circuit Court cases cited by appellants are listed below[7] as are the State Court decisions upon which they rely.[8]

If the question here presented has not been decided by the United States Supreme Court or if the meaning of Section 94 cannot be gleamed from its opinions in more or less analog-

[6]"Texas: Guerra v. Lemburg, 22 S. W. 2d 336 (1929) (Writ Dis.); New York: Chafee v. Glen Falls National Bank & Trust Co., 123 N.Y S. 2d 635 (1953), Affirmed 128 N.Y.S. 2d 539; Appeal to Court of Appeals denied 129 N.Y.S. 2d 237; Michigan: Levitan v. Houghton Bank, 140 N. W. 1019, 174 Mich. 566 (Sup. Ct. 1913); Minnesota: DeCock v. O'Connell, 246 N. W. 885, 86 A.L.R. 41 (Sup. Ct. 1933); North Carolina: Curlee v. Bank, 187 N. C. 119, 121 S. E. 194 (Sup. Ct. 1924); Wisconsin: Brust v. Bank, 184 Wisc. 15, 198 N. W. 749 (Sup. Ct. 1924); New Jersey: Cassatt v. Bank, 9 N. J. Misc. Rep. 222, 153 A. 377 (Sup. Ct. 1931); Alabama: Bank v. Alston, 165 So. 241 (Sup. Ct. 1936); California: Fresno National Bank v. Superior Court 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890)."

[7]Buffum v. Chase National Bank, 192 F. 2d 58, Certiorari denied, 242 U. S 994, 72 S. Ct. 558; International Refugee Organization v. Bank of America, 86 F. Supp. 884; Schmitt v. Tobin, 15 F. Supp. 35; Leonardi v. Chase National Bank, 81 F. 2d 19, 2d Cir., Certiorari denied, 298 U. S. 667.

[8]County of Okeechobee v. Florida Nat. Bank. 150 So. 124 (Florida, 1933); Monarch Wine Company v. Butte, 249 P. 2d 291 (Cal. 1952); Zarbell v. Bank of America Nat. Trust & Savings Association, 327 P. 2d 436 (Wash. 1958); Crofoot v. Giannini, 92 NYS 2d 191 (1949); Rabinowitz v. Kaiser-Frazer Corporation, 96 N.Y.S. 2d 638 (1950).

ous cases and if the question is an open one for this Court then we state that we have considered all State cases and Federal decisions from lower courts for their persuasiveness. Especially have we been impressed by the thorough treatment of the matter and the sound reasoning found in the Monarch Wine case from California and we quote the following from that opinion:

> "The federal cases interpreting section 94 seem to establish three propositions: (1) Where actions against a national bank are brought in a state court outside the state where it is located the action must be dismissed because there is no procedure for transferring the action from one state to another. See Schmitt v. Tobin, D. C., 15 F. Supp. 35, where an action brought in Nevada against a Caliorria national bank was dismissed. (2) Where the actions are brought in a federal court in a district other than that in which the bank is located the actions formerly were required to be dismissed as the federal law provided no procedure for transfer. See Leonardi v. Chase Nat. Bank of City of New York, 2 Cir., 81 F. 2d 19, where the court dismissed an action brought against a national bank in a federal court in a district other than that of the bank's residence. To the same effect, International Refugee Organization v. Bank of America, etc., D. C., 86 F. Supp. 884, and Buffum v. Chase National Bank of City of New York, 7 Cir., 192 F. 2d 58. Such a procedure has now been provided and the case would now be transferred to the proper district. Plaintiffs concede that the law as to these two propositions is as above stated. (3) Where the action is brought in a state court of a state in which the bank is located but not in the county of its location, and where state law has a procedure for change of venue, the action must not be dismissed, but upon application must be transferred to the county in which the bank is located.

"The New York courts since 1883 in dealing with the question of whether the statute in question is mandatory or permissive, have held it mandatory, saying, 'Where the meaning of a federal statute is to be ascertained, the decisions of the federal courts construing the statute are controlling on the state courts.' Raiola v. Los Angeles First Nat. Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 305; see also Crofoot v. Giannini, supra, 92 N.Y.S. 2d 191, and Rabinowitz v. Kaiser-Fraser Corporation, 198 Misc. 312, 96 N.Y.S. 2d 638. While these were cases dealing with actions against national banks whose residences were outside the state we can see no difference in the language or the effect of that portion of section 94 referring to suits not brought in the state of the bank's residence and those not brought in the county of its residence. Crocker v. Marine National Bank of New York, 101 Mass. 240, and Burns v. Northwestern Nat. Bank of Minneapolis, Minn., supra, 260 N.W. 253, held the same way as the cited New York cases.

"Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, contrary to the decisions in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F. 2d 19, Schmitt v. Tobin, supra, 15 F. Supp. 35, and Rabinowitz v. Kaiser-Fraser Corp., supra, 96 N.Y.S. 2d 638, held that section 94 applied only to actions for penalties for usury. Cassatt v. First Nat. Bank, 153 A. 377, N. J. Misc. 222, without discusing the federal cases on the subject and in spite of them, held section 94 applied to jurisdiction and not to venue.

"The language in Buffum v. Chase Nat. Bank of City of New York, supra, 192 F. 2d 58, at page 60, although the court was dealing with an action brought against a bank in a state other than that of its residence, applies here: 'The issue here then is not one of jurisdiction of the subject matter, but one as to the proper venue, the proper locality. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, at page 168, 60 S. Ct. 153, 84 L. Ed. 167. It seems clear that the

proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U.S.C.A.'

"In spite of the above decisions of some state courts we believe (1) we are bound by the decisions of the United States courts on the interpretation of section 94; (2) those courts have held directly in the Charlotte and Casey cases as to suits brought in the wrong county of a state and indirectly in other cases dealing with suits brought in the wrong state or in the wrong federal district, that section 94 is mandatory. If it was intended that the national bank could be sued in any court of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located.' But the section said the action is to be brought in the 'court in the county or city' in which the bank is located. (3) The plain and logical reading of the section shows that there is no difference in meaning between the various portions of the section, and (4) defendant is entitled as a matter of right under section 94 to a change of venue to the county of its residence. Hence the order denying its motion for such change was erroneous."

Our opinion, based upon the decision of Circuit Court of Appeals in Leonardi (f.n. 7), with which we agree, is that the San Antonio Court in Guerra erroneously concluded that Section 94 applied only to actions for penalties arising from usury.

In our study of this case we have been struck by the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous. While it was entangled with the usury provisions of the federal law, confusion was understandable.

Since the separation of Section 94 from the usury provisions of Title 12 (1926) we can find no tenable ground upon

which to construe a plain statute in any manner contrary to its express wording.

That this statute should be construed as merely permitting a national bank to be sued in the county of its location is to attribute to the Congress little knowledge of the law of venue. Both the common law and the Spanish law permitted suits to be maintained where the defendant resided[9] and such is the general rule of the States.[10]

The judgments of the Trial Court are reversed and these causes are remanded with instructions to render judgment sustaining appellants' pleas of privilege and to transfer these causes as to these appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P.

Robert G. Hughes, Associate Justice

Reversed and Remanded with Instructions.
Filed: December 9, 1959.

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[9]Vol. 38, Tex. Law Review p. 36. Spanish Influence on the Texas Law by Joseph Webb McKnight.

[10]Vol. 92 C.J.S., Venue, Sections 4, 6, 7 and 82.

APPENDIX C

Judgment of the 98th District Court of Travis County, Texas in Case No. 110,917 Overruling Plea of Privilege of Mercantile National Bank at Dallas

"On this the 20th day of February, 1959, came on to be heard by agreement of the parties the plea of privilege of defendant, MERCANTILE NATIONAL BANK AT DALLAS, and the Court having heard the pleadings, evidence and argument of counsel is of the opinion that said plea of privilege should be overruled;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the plea of privilege of MERCANTILE NATIONAL BANK OF DALLAS be, and same is hereby overruled, to which action of the Court said defendant in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Dated, signed, and rendered this 2nd day of April, 1959.

D. B. Wood
Judge Presiding"

Judgment of the Austin Court of Civil Appeals in Cause No. 10,712

"THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the cause is remanded with instructions to render judgment sustaining appellants' plea of privilege and transfer this cause as to appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P. It is FURTHER ordered that the appellee pay

all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance."

Judgment of the Supreme Court of Texas in Cause No. A-7729

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Calvert concurring in the result) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, in all things affirmed.

"It is further ordered that respondent, Mercantile National Bank at Dallas, and the surety on its appeal bond, American Surety Company of New York, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, C. H. Langdeau, Receiver of I. C. T. Insurance Company, have and recover of and from the said Mercantile National Bank at Dallas, and surety, American Surety Company of New York, the costs by him expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance."

APPENDIX D

I. The Texas Statute Involved

Article 21.28 of the Insurance Code of Texas, as amended in 1955 (Acts 1955, 54th Leg., p. 737, ch. 267) is captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers." Section 4(f) thereof provides:

> "Sec. 4. Actions.
>
> "• • •
>
> (f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

II. The Federal Statute Involved

Title 12 of the United States Code, as codified in 1925, is captioned "Banks and Banking." Chapter 2 of said Title 12 of the United States Code is captioned "National Banks." Section 94 of said Title 12 of the United States Code, which is a part of said Chapter 2 thereof relating to "National Banks", provides:

> "§94. Venue of suits
>
> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. R.S. §5158; Feb.

18, 1875, c. 80, §1, 18 Stat. 320; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167."

This statutory provision was Section 57 of the Act of June 3, 1864. 13 Stat. 116-117. It was omitted in the Revised Statutes of 1873. The omission was corrected by the Act of February 18, 1875. 18 Stat. 320. The Act of March 3, 1911, 36 Stat. 1167, conferred the powers and duties of the circuit courts upon the district courts.

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No. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I.C.T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No.

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I.C.T. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of Texas (the court of last resort in that jurisdiction) holding that the provision of the National Banking Act specifying venue in suits against national banks was merely directory as to suits in Texas courts, and that venue was determined by the Texas statute pertaining to insurance receiverships.

A. OPINIONS BELOW

The opinion of the Supreme Court of Texas is unofficially reported at *341 S. W. 2d 161*. No official report of this opinion has yet been issued. A copy of this opinion is attached hereto as "Appendix A." The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, also known as the Austin Court of Civil Appeals, is unofficially reported at *331 S. W. 2d 349*. There is no official report of this opinion. A copy of this opinion is attached hereto as "Appendix B." Copies of the judgments of the trial court, the Austin Court of Civil Appeals, and the Supreme Court of Texas, are attached to this statement as "Appendix C."

B. GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

1. In 1958 appellee as Receiver of I.C.T. Insurance Company sued appellant, Republic National Bank of Dallas, and some one hundred forty-three other defendants, among them the Mercantile National Bank at Dallas. This suit was a tort action for damages and was brought in the 98th Judicial District Court of Travis County, Texas. Appellant filed a plea of privilege to be sued in the county where it is located, Dallas County, Texas. The plea was based upon the provisions of 12 U. S. C. §94 The Mercantile National Bank at Dallas filed a similar plea. Appellee filed a controvertir plea claiming that Article 21.28, Sec. 4(f), Insurance Co of Texas, gave it the right to maintain these actions against the two national banks in Travis County, Texas. Pursuant to

the usual practice in the State of Texas, a separate trial was held on the venue question. The trial court overruled the pleas of privilege, and after an intermediate appeal to the Austin Court of Civil Appeals, the Supreme Court of Texas entered judgments affirming the trial court and sustaining venue in Travis County, Texas.

2. The date of the judgment of the Supreme Court of Texas is November 23, 1960. Appellant and the Mercantile National Bank at Dallas each filed motions for rehearing, and these motions were overruled on December 21, 1960. On March 18, 1961, appellant filed in the Supreme Court of Texas its notice of appeal to the United States Supreme Court. The Mercantile National Bank at Dallas filed its notice of appeal in that Court on March 16, 1961.

3. Jurisdiction of this appeal is conferred by Section 1257 (2), of Title 28 of the United States Code.

4. At the trial of the venue plea, appellant drew in question the validity of Article 21.28, Sec. 4(f), Insurance Code of the State of Texas, as applied to actions against national banks on the grounds that it was repugnant to 12 U. S. C. §94, the Federal statute which sets out venue of suits against national banks. By affirming the decision of the trial court, and thus holding that venue as to national banks is governed by the Texas statute, the Supreme Court of Texas has decided in favor of the validity of the State statute. The federal statute conferring jurisdiction of this appeal also requires that the judgment or decree of the State court be "final." The meaning of "final" in this context must be considered

in connection with the facts of this case, and in light of the interpretation which the United States Supreme Court has placed on that word, These two national banks have asserted a right granted them by Federal law, the right to be sued in the county of their residence. The Texas courts, in a separate proceeding, have considered this question alone and have declined to recognize this right. The only thing which remains is to proceed to trial on the merits; if the decision of the Supreme Court of Texas is sustained, trial will proceed on a single action against one hundred and forty-four defendants outside the county and city of residence of these national banks. The question of venue will not be litigated again in the State courts. To that extent, the judgment of the Supreme Court of Texas is a final judgment. If review of the venue question is postponed until after trial on the merits, the federally granted right of these national banks to be sued only in the county of their residence will have been rendered a nullity; the banks will already have been forced to trial outside that county.

In construing the meaning of "final" for the purposes of appellate review, this Court has not construed it so narrowly as to mean that all proceedings in a case must have ended before it would grant review. See, e.g., *Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Clark v. Williard, 292 U. S. 112 (1934)*. Rather, the interpretation has been one which would strike a reasonable balance between avoiding fragmentary review and yet determining important questions at that point in the litigation which would most advantageously benefit the course of the proceedings. This reasoning has per-

haps best been expressed in the case of *Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 (1949).* (Admittedly, the *Cohen* case involved an appeal from a federal, rather than a state court. Nevertheless the problems and solutions in these two types of review have been similar.) The court said, at *337 U. S. 546:*

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Likewise, as stated in *Republic Natural Gas Company v. State of Oklahoma, 334 U. S. 62, 68 (1948):*

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing."

The issue presented by this appeal has been severed from the merits of the case. The facts are undisputed. Litigation in Texas on venue is over. Unquestionably, unless review is granted at this time irreparable injury will result. This question is one that is too important and too independent to await final determination of this complex and protracted case.

This appeal is not subject to the objections which are normally raised when an interlocutory injunction is brought up for review. Review on an interlocutory injunction usually involves the same questions which would later arise in reviewing the permanent injunction decree. The Texas courts

will not again consider the question involved here, and there should be no objection to reviewing it now. In *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952)*, the Court in declining to take jurisdiction to review an interlocutory injunction, pointed out that the appellant could just as easily have converted his interlocutory decree into a final decree before appealing the case. By contrast, this simple method was not open to appellant in this case. Had appellant not appealed the venue question, it would have been waived. *Smith Bros. Grain Company v. Windsor & Stanley, 255 S. W. 158 (Tex. Comm. App., 1923, op. adopted by Texas Supreme Court).*

Finally, if appeal were brought after trial on the merits, what decree would effectively assist appellant? Venue does not go to the merits, so reversal would not be appropriate. Remand for new trial with proper venue would not assist appellant; the damage would have been done. The only effective relief which is open to appellant Republic National Bank of Dallas and to Mercantile National Bank at Dallas is review at this time on this portion of the case.

5. The text of Section 4(f), Art. 21.28, Texas Insurance Code, the Texas statute held to be valid in this case, is as follows:

> "(f) New Lawsuits. The Court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all action of proceedings instituted after the commencement of delinquency proceeding by or against the insurer or receiver."

Article 21.28 of the Texas Insurance Code, which regulates the liquidation, rehabilitation, reorganization, or conservation of insurance companies, is found in the *General and Special Laws of Texas, Acts 54th Legislature, Regular Session, 1955, Ch. 267, p. 737.* (Section 4(f) is at p. 742.)

C. QUESTIONS PRESENTED

1. Are the provisions of 12 U. S. C. §94 designating venue in actions against national banks in state and federal courts mandatory as to actions in federal courts, but only permissive as to actions in state courts?

2. Can a state statute relating to venue of suits by a receiver of an insurance company validly override the provisions of an Act of Congress prescribing venue of actions brought against an instrumentality of the federal government—a national bank?

D. STATEMENT

Appellee, the Receiver of I.C.T. Insurance Company, brought a tort action in the 98th District Court of Travis County, Texas, against Republic National Bank of Dallas, and 143 defendants including Mercantile National Bank at Dallas, Texas. In accordance with Texas practice, appellant promptly filed a plea of privilege* (the pleading challenging venue) to be sued in Dallas County, Texas, the county

*See Plea of Privilege of Republic National Bank (R. 349-364). By agreement and pursuant to Supreme Court Rule 12(5), only one record was prepared and docketed, to be used in the appeal of Mercantile National Bank at Dallas as well as in this appeal.

wherein appellant is located, basing its plea of privilege solely on the provisions of 12 U. S. C. §94 which provides:

> "94. Venue of suits
>
> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Mercantile National Bank filed an identical plea of privilege. (See R. 345-348.) Appellee filed a controverting plea. (See R. 365-371.) Thus the federal questions involved in this appeal were put in issue.

In accordance with the Texas procedure a separate hearing and trial was held to determine venue. By agreement the venue rights of both national banks were heard and determined in one consolidated trial. The trial court overruled the pleas of privilege of both national banks (Appendix C) refusing to recognize the provisions of 12 U. S. C. §94 as controlling and paramount. Both national banks appealed the judgment of the trial court to the Austin Court of Civil Appeals and in connection with the appeal stipulated with appellee:

> "The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitle said defendants [appellants] to have plaintiff's [appellee's] action against them transferred to the state court in Dallas County, Texas, or whether state statutes on venue of such action are controlling." [Par. 2 (e), Agreement, R. 376.]

Thereafter the Court of Civil Appeals in an opinion based strictly upon the issue of whether 12 U. S. C. §94 or Art. 21.28, Sec. 4(f), Texas Insurance Code, controlled venue, entered its judgment sustaining appellant's position that the federal statute controlled venue in actions against a national bank. (See Appendix B.)

Appellee then applied for and obtained from the Supreme Court of Texas a writ of error and thereafter that court entered its judgment reversing the Court of Civil Appeals and affirming the judgment of the trial court. (See Appendix C.) Appellant filed motion for rehearing which was thereafter overruled. The Supreme Court of Texas likewise based its judgment exclusively upon a determination of the federal questions here presented. (See Appendix A.)

E. GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Fundamental to the federal system of dual sovereignty is the proposition that the Acts of Congress are paramount concerning instrumentalities of the federal government, such as national banks. *Davis v. Elmira Savings Bank, 161 U. S. 275 (1896)*. Likewise, there is no doubt that Congress may validly determine to what extent state courts may be permitted to entertain actions by and against national banks. This Court has held:

> "National banks are quasi-public institutions, and, for the purpose for which they are instituted, are national in their character and within constitutional limits subject to the control of Congress, and are not

> to be interfered with by state legislative or judicial action except so far as the lawmaking power of the government may permit." *Van Reed v. Peoples National Bank, 198 U. S. 554 (1905.)*

Congress, in enacting the *National Banking Act of 1864, Act of June 3, 1864, 38th Congress, First Session, Chapter 106; 13 Stat. 99, 116*, set out in Sec. 57 of that Act substantially the identical provisions now codified as 12 U. S. C. §94, and thereby prescribed venue in suits against national banks, whether brought in Federal or in state courts. The National Banking Act provided that venue in state courts was to lie in the county or city in which the national banking association in question was located. Appellant, Republic National Bank of Dallas, has its only place of business in Dallas, Dallas County, Texas [Agreement, Par. 2(d) R. 376]. Yet the Texas Supreme Court in this case erroneously held:

> "This is a matter where the state is exercising powers wholly within the domain of state interests, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes."

The Texas opinion holds that state courts are free to ignore the Act of Congress which the court regarded as merely permissive and limited in its application to actions brought in federal courts.

While this Honorable Court has only had occasion to be concerned with the venue provisions of the National Banking Act in *Casey v. Adams, 102 U. S. 66 (1880); First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889);*

and in *Cope v. Anderson, 331 U. S. 461 (1947)*, there is an unbroken line of federal authority applying and enforcing the venue provisions of the National Banking Act as mandatory and applicable. Even *Casey v. Adams*, supra, recognized that as to transistory actions as distinguished from purely local actions the National Banking Act venue provisions control in state courts. In *First National Bank of Charlotte v. Morgan*, supra, this Court characterized the venue provisions of the National Banking Act as an exemption of national banks against suit in state courts except in the city or county in which the bank is located, and stated (p. 145):

> "* * * if it had been claimed by the defendant, when appearing in the Superior Court of Cleveland County, *must* have been recognized."

In its most recent decision of *Cope v. Anderson, 331 U. S. 461, 467 (1947)*, supra, this Court stated:

> "For jurisdictional purposes a national bank is a 'citizen' of the state in which it is established or located, 28 U.S.C. §41 (16), and in that district alone can it be sued, 12 U.S.C. §94."

Other federal decisions are equally unanimous in holding that national banks are exempt from suits in courts other than those of its location. *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (C.C.A. 2d Cir., 1936—cert. den., 298 U. S. 677); Buffum v. Chase National Bank of the City of New York, 192 F. 2d 58 (C. A. 7th Cir., 1951—cert. den. 342 U. S. 994); International Refugee Organiza-*

tion v. Bank of America, 86 F. Supp. 884 (S. D. N. Y., 1949); Schmidt v. Tobin, 15 F. Supp. 35 (D. C. Nevada, 1935).

The Texas Supreme Court opinion, while recognizing the mandatory effect of the venue provisions of the National Banking Act in actions in federal courts, takes the untenable position that the same language in the same section of the same statute as applied to state courts is merely permissive. This conclusion was buttressed not by any federal decision construing this federal statute, but rather by resorting to some state court decisions.

The Texas Supreme Court further based its decision upon Acts of Congress amending the Judiciary Act and erroneously construed them as limiting the venue provisions of the National Banking Act to suits in federal courts. The Acts of Congress relied upon are *Section 4 of Chapter 290, Act of July 12, 1882, 22 Stat. 162,* which was after numerous amendments and reenactments codified as 28 U. S. C. 1348, and the *Act of June 25, 1948, 80th Congress, Second Session, Chapter 646; 62 Stat. 869, 28 U. S. C. §1348.* Although Sec. 4 of the Act of July 12, 1882 did contain a provision providing that *jurisdiction* in federal courts over suits by or against national banks would be the same as federal courts' *jurisdiction* over state banks, this provision related exclusively to *jurisdiction* in *federal* courts, and did not repeal, affect, or amend the provision pertaining to *venue* in state courts set out in the National Banking Act. The Na-

tional Banking Act and the Act of July 12, 1882 do not relate to the same subject matter. The Act of July 12, 1882 was enacted for the sole purpose of divesting federal courts of jurisdiction to try cases against National Banks based *solely* upon their status as federal corporations. *Petri v. Commercial National Bank of Chicago, 142 U. S. 644 (1892); Van Reed v. Peoples National Bank, 198 U. S. 554 (1904); Leather Manufacturers National Bank v. Cooper, 120 U. S. 778, 780-81 (1887);* and *Continental National Bank of Memphis v. Buford, 191 U. S. 119, 123-4 (1903).*

CONCLUSION

To allow the Texas Supreme Court's construction of the venue provisions of the National Banking Act to stand is to deprive the statute of all meaning insofar as suits in Texas courts are concerned, for Texas courts would be free to recognize or ignore these provisions as they saw fit. The decision of the Texas Supreme Court is based upon a complete misconception of the paramount power of Congress to prescribe and set forth conditions under which suits might be brought against federal instrumentalities, a misconstruction of the venue provisions of the National Banking Act, and an erroneous construction of the amendments to the Federal Judiciary Act. The controlling and fundamental issue is whether federal decisions construing federal statutes shall be followed by state courts or whether a state court is free to disregard the express provisions of an Act of Congress

relating to and governing suits against a federal instrumentality. It is respectfully submitted that questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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Attorney for Appellant.
Republic National Bank of Dallas,
1600 Republic National Bank Bldg.,
Dallas 1, Texas,

PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1961, I served copies of the foregoing jurisdictional statement on appellee thereto, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

To Cecil C. Rotsch, Esq.,
P. O. Box 13,
Austin, Texas.

To Quentin Keith, Esq.,
Keith, Mehaffy, McNicholas & Weber,
Kaufman Trust Building,
Beaumont, Texas.

To W. E. Cureton, Esq.,
Cureton & Lanham,
401 Professional Building,
Waco, Texas.

None of the persons on whom service is to be made resides five hundred miles or more from me.

NETH L. LEACHMAN,
Attorney for Appellant.
Republic National Bank of Dallas,
1600 Republic National Bank Bldg.,
Dallas 1, Texas,

APPENDIX A

Opinion of the Supreme Court of the State of Texas

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Republic National Bank of Dallas, Respondent.

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Mercantile National Bank at Dallas, Respondent.

Nos. A-7728, A-7729.

Supreme Court of Texas.

Nov. 23, 1960.

Rehearing Denied Dec. 21, 1960.

Cecil C. Rotsch, Austin, Keith, Mehaffy, McNicholas & Weber, Beaumont, Cureton & Lanham, Waco, for C. H. Langdeau.

Dan Moody, Austin, Leachman, Gardere, Akin & Porter, Dallas, for Republic Nat. Bank of Dallas.

Carrington, Johnson & Stephens, Dallas, for Mercantile Nat. Bank at Dallas.

SMITH, Justice.

These venue cases present but a single question of law which may be disposed of in one opinion.

[1] The question presented is: Does Title 12 U.S.C.A. § 94,[1] give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f)[2] of the Insurance Code, the right to have an action against it tried in the county of its domicile?

The Court of Civil Appeals in its opinion reported in Vol. 331 S. W. 2d 349, answered the question in the affirmative. The opinion, in effect, sustained the bank's position: (1) that federal statutes are paramount on matters affecting such federal instrumentalities as national banks, and that state statutes in conflict therewith must yield to the federal statutes, and (2) that the decisions of United States courts involving the construction of federal statutes relating to national banks are binding on state courts and that the state venue statutes are not applicable.

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[1]"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases. Sec. 94, Title 12, U. S. Code, annotated.

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348."

[2]"New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The record reveals that delinquency proceedings were filed in the 98th District Court against I.C.T. Insurance Company and petitioner, C. H. Langdeau, was appointed receiver under the provisions of Section 2(a) of Article 21:28, supra, of the Insurance Code.

Thereafter, petitioner instituted this suit against a number of defendants, including the two respondent national banks, charging a conspiracy to defraud the insurance company, its policyholders, stockholders, and creditors, and sought a judgment against all defendants, jointly and severally. In effect, it is a suit for the recovery of assets of the delinquent insurance company. In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed.

[2] The respondents' pleas of privilege to be sued in Dallas County, Texas, the county of the residence and location of each banks, were overruled by the trial court, but sustained by the Court of Civil Appeals as already stated. We deem it necessary to take note of the respondents' challenge to the jurisdiction of this court, which is to the effect that when, as here, a conflict of decisions is made the basis of Supreme Court jurisdiction, it is essential that such conflict appear on the face of the opinions themselves, and that petitioner has failed to meet such test. This test is laid down in the case of State v. Wynn, 157 Tex. 200, 301 S. W. 2d 76. We believe that the decision in the present case is sufficiently in conflict with the decision in the

case of Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, er. dism. to give this court jurisdiction.

In the case of Guerra v. Lemburg, supra, the Commercial State Bank of Sinton, San Patricio County, Texas, and the City National Bank of Corpus Christi, Nueces County, Texas, were sued in Hidalgo County, the residence of a co-defendant. The National Bank of Corpus Christi filed a plea of privilege to be sued in its home county claiming, as the respondents claim in the present case, that under the provisions of 12 U.S.C.A. § 94, a national bank can only be sued in a state court in the county of its domicile, regardless of the fact that under the provisions of the Texas venue statutes, the suit could have been brought in Hidalgo County where alleged fraudulent representations were made. The trial court sustained the plea of privilege. The Court of Civil Appeals reversed, holding that the bank was not entitled to a change of venue,[3] thereby holding directly opposite to the holding in the present case. The

[3]Quote from Guerra v. Lemburg, supra [22 S. W. 2d 337]:

"In * * * (28 U.S.C.A. § 41(16) [1948 Rev., 28 U.S.C.A. § 1348]), national banks are declared to be, for the purposes of all other actions except those enumerated, against or by them, for property, * * *, and suits in equity, citizens of the states in which they are respectively located. Being citizens of a state carries with such citizenship the burdens, as well as the privileges, pertaining to it. This is provided in * * * (12 U.S.C.A. § 24(4), as to national banks, where they are given the power 'to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.'

"In conferring jurisdiction generally upon state courts in regard to suits against national banks, * * * the provision in question is embodied * * * under the head 'Usurious Interest' (12 U.S.C.A. §§ 86, 94), showing conclusively that no provision preventing national banks from being sued in state courts, under any and all other circumstances, in any other than the county of the domicile is in existence. The provision has reference alone to actions for penalties arising from usuary, which is legislated against in the paragraph cited. The law does not apply to any other class of actions, and in all other suits national banks are citizens of the state in which they are located, clothed with the privileges of citizenship, and subject to any burdens and liabilities attached thereto."

Court of Civil Appeals in the present case quotes at length from the case of Monarch Wine Company v. Butte, 1952, 113 Cal. App. 2d 833, 249 P. 2d 291. That case refers to the case of Guerra v. Lemburg, supra, and the case of Leonardi v. Chase National Bank of City of New York, 2 Cir., 81 F. 2d 19. The Court of Civil Appeals cites this latter case in support of its holding that the federal statute controls. The Monarch Wine Company case, supra, held that the decision in the Guerra v. Lemburg case, supra, is contrary to the decision in Leonardi, supra, and the opinion of the Court of Civil Appeals in the present case holds that the Guerra case was erroneously decided, and that it agrees with the Leonardi case. We are convinced that the specific conflicting holdings in the two cases create a jurisdictional conflict. The holdings are so far upon the same state of facts that the decision of one of the cases is necessarily conclusive of the decision in the other. See Dockum v. Mercury Ins. Co., 134 Tex. 437, 135 S. W. 2d 700. Accordingly, the application for writ of error presents a case within the jurisdiction of this court.

We now proceed to a decision of the principal question. We have concluded to reverse the judgment of the Court of Civil Appeals and affirm that of the trial court for the reasons now to be stated.

If, under federal decisions, United States Revised Statute § 5198, 12 U.S.C.A. § 94, is applicable here, then all state statutes in conflict therewith must yield. See Van Reed v. Peoples National Bank, 198 U. S. 554, 25 S. Ct. 775, 49 L. Ed. 1161; Citizens National Bank of Stamford

v. Stevenson, Tex. Com. App., 231 S. W. 364. We agree that the issue here also is not one of jurisdiction, but is one as to proper venue, or proper locality where a state statute has fixed venue. However, we do not agree with respondents' contention that the proper venue of this action is determined by Section 94 of 12 U.S.C.A., supra. See Casey v. Adams, 1880, 102 U. S. 66, 68, 26 L. Ed. 52. The proper venue of this case is determined by Article 21.28, § 4(f), supra, which provides, in effect, that the court of competent jurisdiction of the county in which the delinquency proceedings are pending shall have venue to hear and determine all actions or proceedings instituted after the commencement of the delinquency proceedings.

[3] It was not the intention of the Congress in adopting 12 U.S.C.A. § 94, supra, that it was to control with respect to an action against a national bank commenced in a state court, especially where such action was commenced in a district court located in the county designated by state statute to have venue. This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes. It is unnecessary to our decision to determine whether this particular action is local or transitory in nature. Texas has adopted Article 21.28, supra. This is the statute which is applicable to the action here involved. In 92 C.J.S. Venue § 7, p. 678, it is said: "In many jurisdictions statutory enactments applicable to actions whether transitory or local, have rendered the distinction between these classes of

actions of minor importance, or have done away with it entirely." Therefore, whether our action properly belongs to one class or the other, it, nevertheless, must be instituted under the conditions prescribed in the state statute. See State ex rel. Gardner v. Hall, 282 Mo. 425, 221 S. W. 708.

However, the courts are in conflict on the question as to whether an action can be brought against a national bank in a state court outside of the county in which the bank is located. U. S. Revised Statutes § 5198, 12 U.S.C.A. § 94, supra, has been differently construed by state courts. A majority of the state courts have held that the provisions of 12 U.S.C.A. § 94, quoted above, do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. See the annotation "National Bank as subject to suit outside county of its resident," 86 A.L.R. 47. The courts so holding apparently proceeded on the theory that the use of the word "may" in the statute renders it permissive and not mandatory, and, hence, national banks may be sued in any state court of competent jurisdiction, even though the court is outside of the county in which the bank is located. Paton's Digest of Legal Opinions, edited and compiled by the American Bankers Association, under the supervision and direction of Thomas B. Paton, Assistant General Counsel of the Association, Vol. II, p. 2407 et seq., recognizes the rule announced in the case of Curlee v. National Bank of Fayetteville, 1924, 187 N.C. 119, 121 S.E. 194, 195, to be against the contention of the banks in the present case.

Paton correctly analyzes the Curlee case: "In that case it appears that the plaintiffs, resident of Mecklenburg County, North Carolina, sued the defendant, a national bank located in Cumberland County, North Carolina, for alleged damages to the plaintiffs; financial and social standing arising from a wrongful attachment of the plaintiffs' property in Cumberland County. The action was brought in the superior court of Mecklenburg County. The bank thereupon entered a special appearance, asking for a removal of the case to the superior court of Cumberland County, on the principal ground that, under the federal statute, quoted above, a national bank without its consent is not suable in any state court other than a state court located in the county in which it has its place of business. The court, pointing out that the authorities are conflicting, ruled that the defendant bank's contention was not sustainable.

"The following cases hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against national bank located or doing business in another state, or in a district or county other than that in which the action is brought; Fresno Nat. Bank v. Superior Ct., 83 Cal. 491, 24 P. 157; Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S.E. 269; Cooke v. State Nat. Bank, 50 Barb. (N.Y.) 339, affirmed in 52 N.Y. 96, 11 Am.Rep. 667; Robinson v. National Bank, 81 N.Y. 385, 37 Am.Rep. 508; Talmage v. Third Nat. Bank, 91 N.Y. 531; Lee v. Citizens' Nat. Bank, 5 Ohio Dec. Reprint 21; Holmes v. National Bank, 18 S.C. 31, 44 Am. Rep. 558; Montpelier First Nat. Bank v. Hubbard, 49

Vt. 1, 24 Am.Rep. 97. See also, Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N.W. 1019; Cassat v. First National Bank of West New York, 1931, 9 N.J.Misc. 222, 153 A. 377."

The rule, as expressed in the above decisions, is sound and is hereby approved and followed. Assuming, as we must in this venue case, that both banks are necessary parties, what would be the result if the two banks (or ten banks) had been domiciled in different counties, and each bank, whether two or ten, had filed a plea of privilege under the federal statute? To invoke the rule insisted upon by the respondents would, in effect, deny the petitioner the right to maintain the suit alleged in his petition. See County of Okeechobee v. Florida National Bank, 1933, 112 Fla. 309, 150 So. 124.

[4] Among the cases relied upon by respondents is that of First National Bank of Charlotte v. Morgan, 1889, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282. In this case the court definitely stated that the federal venue statute in force at that time, § 57 of the National Bank Act, 13 Stat. 99, which was practically the same as 12 U.S.C.A. § 94, quoted above, was mandatory rather than permissive. However, the statement was dicta, and is, therefore, not binding on this court.

One of the principal cases relied upon by the respondents, and cited by the Court of Civil Appeals, is that of Leonardi v. Chase National Bank, 2 Cir., 81 F. 2d 19, 22, certiorari denied 298 U. S. 667, 56 S. Ct. 941, 80 L. Ed. 1398. The national bank involved had its principal and central office in the Southern District of New York, and with a branch

office in Brooklyn in the Eastern District of New York. The court held that the bank's principal place of business was established in the Southern District, and not in the Eastern District, the location of its branch bank; that, therefore, the court in the Eastern District was without jurisdiction. The court in so holding said: "* * * To agree with the interpretation of Sections 51 and 52 of the Judicial Code, as amended (28 U.S.C.A. §§ 112, 113 [1948 Rev., 28 U.S.C.A. §§ 1391, 1392, 1401, 1693, 1695]), in Galveston, H. & S. A. R. Co. v. Gonzales * * * the district in which the national bank has its principal place of business and which contains the place recited in its charter * * * should be taken as the proper district for suits against a national bank." The case of Galveston, Harrisburg & San Antonio Railway Company v. Gonzales, 151 U. S. 496, 14 S. Ct. 401, 404, 38 L. Ed. 248, cited in the Leonardi case, supra, as the basis for its holding, was a suit against a railway corporation. There the contention was made that a railway corporation should be considered an inhabitant of the place in which its public office is located, and that the public office of a railroad corporation shall be considered the domicile of such corporation, citing Article 4120, 2 Sayles Texas Civil Statutes. On the other hand, the contention was made that suits against a railway corporation may be brought in any county through or into which the railway of such corporation extends or is operated. The court in holding that the venue of the suit was in the county of its domicile said: "* * * *but it is manifest*

that, so far as the federal courts are concerned, this provision (Article 1195, Texas statute) is subordinate to the first section of the act of 1888, requiring civil suits to be brought within the district of which the defendant is an inhabitant." (Emphasis added.) Clearly, the court in both the Leonardi and the railway corporation cases, was limiting the scope of its holding to transitory actions commenced against national banks and railway corporations in a federal court.

[5] These case are not decisive of the paramount question confronting us here. Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice. The respondent banks have been deprived of no constitutional or statutory rights by the bringing of this action in Travis County.

That the Congress has never intended to exempt national banks from suits in state courts, established elsewhere than in the county or city in which such banks were domiciled, and that the paramount purpose was to limit the effect of the Act to action against national banks commenced in a federal court is demonstrated by its action in amending the Judiciary Act. See Title 28, Judiciary and Judicial Procedure, 80th Cong. 2d Sess., Vol. 62, part 1, p. 869, Public Laws, U. S.Code Cong.Service 1948, pp. A165-A198. When the Act was adopted, it purportedly repealed

Sec. 4, Chapter 290, 22 Stat. 163,[4] which had been a part of the statute since July 12, 1882. A comparison of the provisions of Section 1348, supra, with the provisions of Section 4, Chapter 290, indicates that the former did not actually repeal the latter, but instead reinacted the statute, but in different language. The enactment of Section 4, c. 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not mean the repeal of the section of the Banking Act, now designated as Section 94, supra, but indicated the intention of the Congress to limit the Act so as to apply only to actions against a national bank commenced in a federal court.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

CALVERT, J., concurs in the result.

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[4] "The jurisdiction for suits hereafter brought by or against any association, established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdictions for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws or parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

APPENDIX B

Opinion of the Austin Court of Civil Appeals

NO. 10,711
AND
NO. 10,712

MERCANTILE NATIONAL BANK AT DALLAS
AND
REPUBLIC NATIONAL BANK OF DALLAS,
APPELLANTS

v

C. H. LANGDEAU, RECEIVER, APPELLEE

FROM DISTRICT COURT OF TRAVIS COUNTY,
98TH JUDICIAL DISTRICT, NO. 110,917,
HONORABLE D. B. WOOD, JUDGE

These are venue cases in which the parties have stipulated to the controlling facts and issues.

The controlling facts are that the appellants, Mercantile National Bank at Dallas and the Republic National Bank of Dallas, are, and were at all material times, national banking associations organized and existing under the laws of the United States of America (National Bank Act) with each having its principal and only place of business in Dallas, Dallas County, Texas, and appellee, C. H. Langdeau, Receiver (and his predecessors),[1] was at all such times the duly

[1]The history of prior receivers is stipulated but is not material.

appointed, qualified and acting Receiver for and had taken charge of all the assets of ICT Insurance Company in receivership proceedings in the 98th District Court of Travis County, a court of competent jurisdiction, and who had been designated as Liquidator for such company by the Board of Insurance Commissions of Texas and who, under the laws and orders of the 98th District Court was authorized to maintain this action for the alleged wrongful acts committed by appellants against ICT Insurance Company.[2]

The question of law presented was stipulated to be:

> "The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said plaintiffs' action against them transferred to the state court in Dallas County, Texas, or whether state statutes on venue of such action are controlling."

The federal statutes referred in this stipulation are, and we quote them:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Sec. 94, Title 12, U. S. Code, Annotated.[3]
>
> "The district courts shall have original jurisdiction of any civil action commenced by the United States,

[2]The detailed nature of this suit is not material to these appeals except to state that it is a suit for damages based on an alleged conspiracy.

[3]This section is a part of Chapter 2 of Title 12 of the United States Code, Annotated. Title 12 is entitled: "Banks and Banking." Chapter 2 of said Title, in which is included Section 94, is entitled "National Banks," Section 94 is entitled "Venue of Suits."

or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348.[4]

The State statute referred to is Section 21.28, Sub-section 4(f) of the Texas Insurance Code, which we quote:

"New Lawsuits. The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

There can be no doubt that if venue of these cases is fixed in Dallas by Federal laws the State statute is of no avail. We quote from Van Reed v. People's National Bank, 198 U. S. 554, 25 S. Ct. 775:

"National banks are quasi-public institutions, and, for the purpose for which they are instituted, are national in their character and within constitutional limits subject to the control of Congress, and are not to be interfered with by State legislative or judicial

[4]This Section is a part of Chapter 85 of Title 28 of the United States Code, Annotated. Title 28 is entitled: "Judiciary and Judicial Procedure." Chapter 85 of said Title, in which is included Section 1348 is entitled: "District Courts, Jurisdiction." Section 1348 is entitled: "Banking Association as Party."

action, except so far as the law making power of the government may permit."

In Citizens National Bank of Stanford v. Stevenson, 231 S. W. 364, Tex. Comm. of Appeals (opinion by Judge Powell) it is stated:

> "It is well settled that, if the federal and state provisions upon any point with reference to national banks, conflict, the state rules must yield."

Mr. Justice Hart in Paddock v. Siemoneit, 147 Tex. 571, 218 S. W. 2d 428, stated this rule for construing Federal statutes:

> "In determining the meaning of Federal laws, this Court is controlled by the decisions of the Supreme Court of the United States. * * * In this instance, however, there does not appear to be any decisions by the United States Supreme Court which is directly in point, and we have to try to arrive at the meaning of the statute from that Court's opinions in more or less analogous cases."

We will now undertake a determination of the question presented from the decided cases of the United States Supreme Court either directly in point or "from that Court's opinions in more or less analogous cases."

For a better understanding of these opinions we give the following condensed history of Section 94 of Title 12, supra:

The Act of June 3, 1864, known as the National Bank Act (13 Stat. 99) contained the following as a part of Section 57:

> "Suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held

within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In the Revised Statutes of the United States, enacted in 1873, there was no statute comparable to Section 57 of the National Bank Act of June 3, 1864. This omission was remedied by the Act of February 18, 1875 (18 Stat. 316, 320) which added a statute identical with present Section 94, Title 12.

When the corrective legislation of 1875 was enacted however it was as an amendment, by addition, to Section 5198 of the 1873 revision of the United States statutes, which Section dealt only with penalties for charging usurious interest. These provisions were separated in the United States Code adopted June 1926 and the provision relating to penalties was given Section number 86 and the provision as to venue was given Section number 94.

No other changes were or have been made in Section 94.

The predecessor of Section 94 was construed by the United States Supreme Court in First National Bank of Charlotte, North Carolina v. Morgan, 132 U. S. 141, U. S. S. Ct. Rep. 282 (1889). There a national bank was sued in a State Court in a county other than the one in which it was located. No objection on this account was made until the case reached the State Supreme Court. In holding that the privilege of being sued in its home county could be waived by the bank

the United States Supreme Court, Mr. Justice Harlan speaking, said:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in this business that might result from their books sent to distant counties in obedience to process from state courts. First Nat. Bank of Bethel v. Pahquioque Nat. Bank, 81 U. S. 14 Wall. 383, 394 (20:840, 842); Crocker v. Marine Nat. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immuntiy granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in

which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

In Cope v. Anderson, 331 U. S. 461, 67 S. Ct. 1340 (1947) a receiver of an insolvent Kentucky national bank brought suit in Federal District Courts in Ohio and Pennsylvania to enforce stockholders' assessments against Ohio and Pennsylvania stockholders. The question was whether Kentucky statutes of limitation or limitation statutes of Ohio and Pennsylvania controlled. In holding that the cause of action arose in Kentucky and its statutes applied, the Court, Mr. Justice Black speaking, stated:

> "Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U.S.C.A., Sections 30, 33, 34a, 36, 51, 62, 72, 4 F.C.A., Title 12, Sections 30, 33, 34a, 36, 51, 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the State in which it is established or located, 28 U.S.C.A., Sec. 51(16), 7 F.C.A. Title 28, Sec. 41(16), and in that district alone can it be sued. 12 U.S.C.A., Sec. 94, 4 F.C.A. Title 12, Sec. 94."

The one United States Supreme Court case upon which appellees rely is Casey, Receiver v. Adams, 102 U. S. 68, 26 L. Ed. 52 (1880).[5] There proceedings were taken against a national bank in a State court in a parish other than the one in which it was located, in or as a result of a suit to foreclose a mortgage on land. The suit was brought in and

[5]Appellants do cite and quote the following from Bank of America v. Whitney Central National Bank, 261 U. S. 171, 67 L. Ed. 594:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to a suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

the proceedings held in the parish in which the land was situated. The bank objected that it could be sued only in the county of its location. In an opinion delivered by Mr. Chief Justice Waite, the Court held:

> "The federal question in this case is, whether a national bank can be sued in a state court in a local action in any other county or city than that where the bank is located. By sec. 5198, R.S., it is provided that 'Suits, actions and proceedings against any association under this title (the National Banks) may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.' This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the Act of Congress the construction now contended for, would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

> "The proceeding in this case was clearly local in its nature. It related to property in the Parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until 'a conflict of privileges' arising between creditors was settled."

We agree with appellee that Art. 21.28, Section 4(f), V.A.C.S. creates a statutory local action. We do not agree that such actions are necessarily local in nature as that term was used by the Supreme Court in Casey against Adams. This action, a suit for damages for alleged malfeasance, is by no stretch of the imagination local in nature or in character. Morris v. Mo. Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228; Miller v. Howell, 234 S. W. 925, Ft. Worth Court of Civil Appeals.

This, to our satisfaction, distinguishes Casey against Adams and prevents it from being a case directly in point. We are convinced, too, that Casey does not represent the law as reflected by subsequent United States Supreme Court decisions, supra. Those decisions, in our opinion, fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94.

Appellee does not discuss the Federal District and Circuit Court decisions cited by appellants and disposes of them by saying:

> "Decisions by the U. S. Circuit Courts and decisions by the U. S. District Courts in suits filed in Federal Courts have no bearing and are unrelated to the ques-

tion because State Venue Statutes do not control or purport to govern the venue of such suits."

Appellee does, however, cite nine State cases,[6] each from a separate State in support of its position. These cases (one or more) are to the effect that Section 94 applies (1) only in usury cases (2) in transistory cases or (3) that it is permissive (4) that it was repealed by Section 1348, supra, or (5) as stated by the New Jersey Supreme Court in Cassatt:

> "We are inclined to think that the direct application of the statute is to jurisdiction and that it is not in such potent control of venue as to be imperative in the present case."

The Federal District and Circuit Court cases cited by appellants are listed below[7] as are the State Court decisions upon which they rely.[8]

If the question here presented has not been decided by the United States Supreme Court or if the meaning of Section 94 cannot be gleamed from its opinions in more or less analog-

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[6]"Texas: Guerra v. Lemburg, 22 S. W. 2d 336 (1929) (Writ Dis.); New York: Chafee v. Glen Falls National Bank & Trust Co., 123 N.Y.S. 2d 635 (1953), Affirmed 128 N.Y.S. 2d 539; Appeal to Court of Appeals denied 129 N.Y.S. 2d 237; Michigan: Levitan v. Houghton Bank, 140 N. W. 1019, 174 Mich. 566 (Sup. Ct. 1913); Minnesota: DeCock v. O'Connell, 246 N. W. 885, 86 A.L.R. 41 (Sup. Ct. 1933); North Carolina: Curlee v. Bank, 187 N. C. 119, 121 S. E. 194 (Sup. Ct. 1924); Wisconsin: Brust v. Bank, 184 Wisc. 15, 198 N. W. 749 (Sup. Ct. 1924); New Jersey: Cassatt v. Bank, 9 N. J. Misc. Rep. 222, 153 A. 377 (Sup. Ct. 1931); Alabama: Bank v. Alston, 165 So. 241 (Sup. Ct. 1936); California: Fresno National Bank v. Superior Court 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890)."

[7]Buffum v. Chase National Bank, 192 F. 2d 58, Certiorari denied, 242 U. S 994. 72 S. Ct. 558; International Refugee Organization v. Bank of America, 86 F. Supp. 884; Schmitt v. Tobin, 15 F. Supp. 35; Leonardi v. Chase National Bank, 81 F. 2d 19, 2d Cir., Certiorari denied, 298 U. S. 667.

[8]County of Okeechobee v. Florida Nat. Bank. 150 So. 124 (Florida, 1933); Monarch Wine Company v. Butte, 249 P. 2d 291 (Cal. 1952); Zarbell v. Bank of America Nat. Trust & Savings Association, 327 P. 2d 436 (Wash. 1958); Crofoot v. Giannini, 92 NYS 2d 191 (1949); Rabinowitz v. Kaiser-Frazer Corporation, 96 N.Y.S. 2d 638 (1950).

ous cases and if the question is an open one for this Court then we state that we have considered all State cases and Federal decisions from lower courts for their persuasiveness. Especially have we been impressed by the thorough treatment of the matter and the sound reasoning found in the Monarch Wine case from California and we quote the following from that opinion:

> "The federal cases interpreting section 94 seem to establish three propositions: (1) Where actions against a national bank are brought in a state court outside the state where it is located the action must be dismissed because there is no procedure for transferring the action from one state to another. See Schmitt v. Tobin, D. C., 15 F. Supp. 35, where an action brought in Nevada against a Caliornia national bank was dismissed. (2) Where the actions are brought in a federal court in a district other than that in which the bank is located the actions formerly were required to be dismissed as the federal law provided no procedure for transfer. See Leonardi v. Chase Nat. Bank of City of New York, 2 Cir., 81 F. 2d 19, where the court dismissed an action brought against a national bank in a federal court in a district other than that of the bank's residence. To the same effect, International Refugee Organization v. Bank of America, etc., D. C., 86 F. Supp. 884, and Buffum v. Chase National Bank of City of New York, 7 Cir., 192 F. 2d 58. Such a procedure has now been provided and the case would now be transferred to the proper district. Plaintiffs concede that the law as to these two propositions is as above stated. (3) Where the action is brought in a state court of a state in which the bank is located but not in the county of its location, and where state law has a procedure for change of venue, the action must not be dismissed, but upon application must be transferred to the county in which the bank is located.

"The New York courts since 1883 in dealing with the question of whether the statute in question is mandatory or permissive, have held it mandatory, saying, 'Where the meaning of a federal statute is to be ascertained, the decisions of the federal courts construing the statute are controlling on the state courts.' Raiola v. Los Angeles First Nat. Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 305; see also Crofoot v. Giannini, supra, 92 N.Y.S. 2d 191, and Rabinowitz v. Kaiser-Fraser Corporation, 198 Misc. 312, 96 N.Y.S. 2d 638. While these were cases dealing with actions against national banks whose residences were outside the state we can see no difference in the language or the effect of that portion of section 94 referring to suits not brought in the state of the bank's residence and those not brought in the county of its residence. Crocker v. Marine National Bank of New York, 101 Mass. 240, and Burns v. Northwestern Nat. Bank of Minneapolis, Minn., supra, 260 N.W. 253, held the same way as the cited New York cases.

"Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, contrary to the decisions in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F. 2d 19, Schmitt v. Tobin, supra, 15 F. Supp. 35, and Rabinowitz v. Kaiser-Fraser Corp., supra, 96 N.Y.S. 2d 638, held that section 94 applied only to actions for penalties for usury. Cassatt v. First Nat. Bank, 153 A. 377, N. J. Misc. 222, without discusing the federal cases on the subject and in spite of them, held section 94 applied to jurisdiction and not to venue.

"The language in Buffum v. Chase Nat. Bank of City of New York, supra, 192 F. 2d 58, at page 60, although the court was dealing with an action brought against a bank in a state other than that of its residence, applies here: 'The issue here then is not one of jurisdiction of the subject matter, but one as to the proper venue, the proper locality. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, at page 168, 60 S. Ct. 153, 84 L. Ed. 167. It seems clear that the

proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U.S.C.A.'

"In spite of the above decisions of some state courts we believe (1) we are bound by the decisions of the United States courts on the interpretation of section 94; (2) those courts have held directly in the Charlotte and Casey cases as to suits brought in the wrong county of a state and indirectly in other cases dealing with suits brought in the wrong state or in the wrong federal district, that section 94 is mandatory. If it was intended that the national bank could be sued in any court of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located.' But the section said the action is to be brought in the 'court in the county or city' in which the bank is located. (3) The plain and logical reading of the section shows that there is no difference in meaning between the various portions of the section, and (4) defendant is entitled as a matter of right under section 94 to a change of venue to the county of its residence. Hence the order denying its motion for such change was erroneous."

Our opinion, based upon the decision of Circuit Court of Appeals in Leonardi (f.n. 7), with which we agree, is that the San Antonio Court in Guerra erroneously concluded that Section 94 applied only to actions for penalties arising from usury.

In our study of this case we have been struck by the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous. While it was entangled with the usury provisions of the federal law, confusion was understandable.

Since the separation of Section 94 from the usury provisions of Title 12 (1926) we can find no tenable ground upon

which to construe a plain statute in any manner contrary to its express wording.

That this statute should be construed as merely permitting a national bank to be sued in the county of its location is to attribute to the Congress little knowledge of the law of venue. Both the common law and the Spanish law permitted suits to be maintained where the defendant resided[9] and such is the general rule of the States.[10]

The judgments of the Trial Court are reversed and these causes are remanded with instructions to render judgment sustaining appellants' pleas of privilege and to transfer these causes as to these appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P.

Robert G. Hughes, Associate Justice

Reversed and Remanded with Instructions.
Filed: December 9, 1959.

[9]Vol. 38, Tex. Law Review p. 36. Spanish Influence on the Texas Law by Joseph Webb McKnight.

[10]Vol. 92 C.J.S., Venue, Sections 4, 6, 7 and 82.

APPENDIX C

Judgment of the 98th District Court of Travis County, Texas, in Case No. 110,917 Overruling Plea of Privilege of Republic National Bank of Dallas:

"On the 29th day of February, 1959, came on to be heard by agreement of the parties the pleas of privilege of defendant, REPUBLIC NATIONAL BANK OF DALLAS, and the Court having heard the pleadings, evidence and argument of counsel is of the opinion that said plea of privilege should be overruled;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plea of privilege of REPUBLIC NATIONAL BANK OF DALLAS be, and same is hereby overruled, to which action of the Court said defendant in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

"Dated, signed, and rendered this 2nd day of April, 1959.

"/s D. B. Wood
Judge Presiding"

Judgment of the Austin Court of Civil Appeals in Cause No. 10711:

"THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the cause is remanded with instructions to render judgment sustaining appellants' plea of privilege and transfer this cause as to appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P. It is FURTHER ordered that the

appellee pay all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance."

Judgment of the Supreme Court of Texas in Cause No. A-7728:

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Calvert concurring in the result) that there was error in the Judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, in all things affirmed.

"It is further ordered that respondent Republic National Bank of Dallas, and the surety on its appeal bond, The Aetna Causalty and Surety Company, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, C. H. Langdeau, Receiver of I. C. T. Insurance Company, have and recover of and from the said Republic National Bank of Dallas, and surety, The Aetna Casualty and Surety Company, the costs by him expended and incurred in said courts, and that this decision be certified to the District Court of Travis County Texas, for observance."

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FILED
JUN 8 1961
JAMES R. BROWNING, Clerk

No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS APPEAL

QUENTIN KEITH
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CECIL C. ROTSCH
321 West 6th St.
Austin, Texas

Attorneys for Appellee

Baldwin Printing Company, Inc., 209 West 8th Street, Austin, Texas

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Montgomery Building and Construction Trades Council vs. Ledbetter Erection Company, Inc., 344 U. S. 178, 97 L. Ed. 204, 73 Sup. Ct. 196	3
Republic Natural Gas Co. vs. Oklahoma, 334 U. S. 62, 92 L. Ed. 1212, 68 Sup. Ct. 972	3, 4

UNITED STATES CODE CITATIONS

28, U. S. C., Sec. 1257	1

No. 968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

MERCANTILE NATIONAL BANK AT DALLAS,

Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR I. C. T. INSURANCE COMPANY,

Appellee.

Appeal from the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now C. H. LANGDEAU, RECEIVER FOR I. C. T. INSURANCE COMPANY, appellee, and respectfully moves the Court to dismiss this appeal on the ground that the judgment from which Mercantile National Bank at Dallas, appellant, seeks to appeal in this cause is not a final judgment within the provisions of Title 28, U.S.C., Sec. 1257.

This is an appeal from an interlocutory determination of venue in an action by the state appointed receiver of a defunct insurance corporation against appellant and other defendants. Further details of prior proceedings are set out in appellant's Jurisdictional Statement and need not be repeated here.

Pursuant to state practice, there has been absolutely no determination of any aspect of the merits of this cause. The sole and only issue that has thus far been passed upon in this cause is that of venue.

It is well settled that this Court is not bound by state practice in determining the finality of a judgment of a state court for purposes of determining jurisdiction on appeal. It is also well settled that the judgment appealed from must be an effective determination of the litigation, subject to no further review or correction, and not a determination of a merely interlocutory step in the proceeding. *Market Street Railway Co. vs. Railroad Commission of the State of California*, 324 U.S. 548, 89 L. Ed. 1171, 65 Sup. Ct. 770; *Arnold vs. United States for the use of W. B. Guimarin & Co.*, 263 U.S. 427, 68 L. Ed. 371, 44 Sup. Ct. 144. In dismissing for want of jurisdiction the writ of error in the Arnold case, this Court succinctly stated:

> ". . . A case may not be brought here by writ of error or appeal in fragments; . . . to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and . . . if the judgment or decree be not

thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

It is respectfully submitted that the case at bar does not meet the tests of jurisdiction as heretofore established by this Court and by the Federal Statutes.

This cause in its entirety involves in excess of one hundred parties, only one of whom is involved in the instant appeal. It is highly conceivable that other questions of federal import will be raised in a trial on the merits of the cause, either by appellant or other parties to the suit. To try one fragmentary part of the entire proceeding at this time would be militate against the rules heretofore laid down by this Court respecting piecemeal review. *Montgomery Building and Construction Trades Council vs. Ledbetter Erection Company, Inc.*, 344 U.S. 178, 97 L. Ed. 204, 73 Sup. Ct. 196; *Republic Natural Gas Co. vs. Oklahoma*, 334 U.S. 62; 92 L. Ed. 1212, 68 Sup. Ct. 972.

Furthermore, should appellant be successful in obtaining a judgment in its favor on the merits of this cause, appellant would undoubtedly acquiesce in the original determination of the venue issue. *Republic Natural Gas Co. vs. Oklahoma*, supra.

Appellant's argument that the venue question may become moot if not reviewed by the Court at this time is effectively dealt with in this Court's opinion in *Montgomery*, supra, where the Court stated:

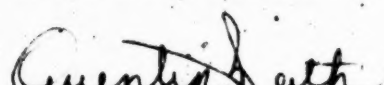
"It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress can do that."

It is, therefore, submitted that appellant has failed to demonstrate this Court's jurisdiction in the instant appeal and falls within the language of this Court's opinion in the *Republic Natural Gas Co.* case, supra, to-wit:

"Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction." (Citing authorities). "The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."

WHEREFORE, appellee respectfully submits that this appeal should be dismissed for want of jurisdiction.

Respectfully submitted,



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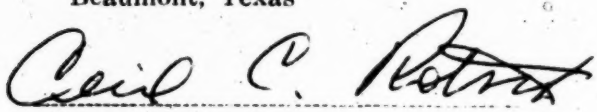
Beaumont, Texas



CECIL C. ROTSCH
321 West 6th St.
Austin, Texas
Attorneys for Appellee

Proof of Service

I, Cecil C. Rotsch, attorney for C. H. Langdeau, Receiver for I. C T. Insurance Company, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of June, 1961, I served copy of the foregoing Motion to Dismiss Appeal on appellant thereto, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for Mercantile National Bank at Dallas, appellant, as follows:

Marvin S. Sloman, Esq.
1700 Mercantile Bank Bldg.
Dallas 1, Texas

Hubert D. Johnson, Esq.
1700 Mercantile Bank Bldg.
Dallas 1, Texas

Neither of the persons on whom service is to be made resides five hundred miles or more from me.

Cecil C. Rotsch

CECIL C. ROTSCH
321 West 6th St.
Austin, Texas
Attorney for Appellee

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 8 1961
JAMES R. BROWNING, Clerk

No. ~~889~~ 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 ~~61~~ 62

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS APPEAL

QUENTIN KEITH
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321 West 6th St.
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Attorneys for Appellee

Baldwin Printing Company, Inc., 209 West 8th Street, Austin, Texas

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Republic Natural Gas Co. vs. Oklahoma, 334 U. S. 62, 92 L. Ed. 1212, 68 Sup. Ct. 972	3, 4

UNITED STATES CODE CITATIONS

28, U. S. C., Sec. 1257	1

No. 969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

REPUBLIC NATIONAL BANK OF DALLAS,

Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR I. C. T. INSURANCE COMPANY,

Appellee.

Appeal from the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now C. H. LANGDEAU, RECEIVER FOR I. C. T. INSURANCE COMPANY, appellee, and respectfully moves the Court to dismiss this appeal on the ground that the judgment from which Republic National Bank of Dallas, appellant, seeks to appeal in this cause is not a final judgment within the provisions of Title 28, U.S.C., Sec. 1257.

This is an appeal from an interlocutory determination of venue in an action by the state appointed receiver of a defunct insurance corporation against appellant and other defendants. Further details of prior proceedings are set out in appellant's Jurisdictional Statement and need not be repeated here.

Pursuant to state practice, there has been absolutely no determination of any aspect of the merits of this cause. The sole and only issue that has thus far been passed upon in this cause is that of venue.

It is well settled that this Court is not bound by state practice in determining the finality of a judgment of a state court for purposes of determining jurisdiction on appeal. It is also well settled that the judgment appealed from must be an effective determination of the litigation, subject to no further review or correction, and not a determination of a merely interlocutory step in the proceeding. *Market Street Railway Co. vs. Railroad Commission of the State of California*, 324 U.S. 548, 89 L. Ed. 1171, 65 Sup. Ct. 770; *Arnold vs. United States for the use of W. B. Guimarin & Co.*, 263 U.S. 427, 68 L. Ed. 371, 44 Sup. Ct. 144. In dismissing for want of jurisdiction the writ of error in the Arnold case, this Court succinctly stated:

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It is respectfully submitted that the case at bar does not meet the tests of jurisdiction as heretofore established by this Court and by the Federal Statutes.

This cause in its entirety involves in excess of one hundred parties, only one of whom is involved in the instant appeal. It is highly conceivable that other questions of federal import will be raised in a trial on the merits of the cause, either by appellant or other parties to the suit. To try one fragmentary part of the entire proceeding at this time would be militate against the rules heretofore laid down by this Court respecting piecemeal review. *Montgomery Building and Construction Trades Council vs. Ledbetter Erection Company, Inc.*, 344 U.S. 178, 97 L. Ed. 204, 73 Sup. Ct. 196; *Republic Natural Gas Co. vs. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212, 68 Sup. Ct. 972.

Furthermore, should appellant be successful in obtaining a judgment in its favor on the merits of this cause, appellant would undoubtedly acquiesce in the original determination of the venue issue. *Republic Natural Gas Co. vs. Oklahoma*, supra.

Appellant's argument that the venue question may become moot if not reviewed by the Court at this time is effectively dealt with in this Court's opinion in *Montgomery*, supra, where the Court stated:

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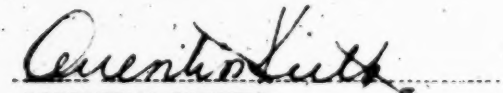
It is, therefore, submitted that appellant has failed to demonstrate this Court's jurisdiction in the instant appeal and falls within the language of this Court's opinion in the *Republic Natural Gas Co.* case, supra, to-wit:

"Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction." (Citing authorities). "The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."

WHEREFORE, appellee respectfully submits that this appeal should be dismissed for want of jurisdiction.

Respectfully submitted,



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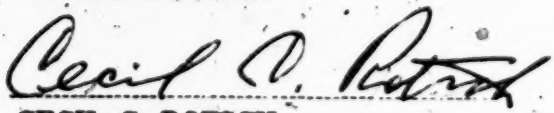

CECIL C. ROTSCH
321 West 6th St.
Austin, Texas
Attorneys for Appellee

Proof of Service

I, Cecil C. Rotsch, attorney for C. H. Langdeau, Receiver for I. C T. Insurance Company; appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7. day of June, 1961, I served copy of the foregoing Motion to Dismiss Appeal on appellant thereto, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for Republic National Bank of Dallas, appellant, as follows:

Neth L. Leachman, Esq
1600 Republic National Bank Bldg.
Dallas 1, Texas.

The above attorney upon whom service is to be made does not reside five hundred miles or more from me.

Cecil C. Rotsch

CECIL C. ROTSCH
321 West 6th St.
Austin, Texas
Attorney for Appellee

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 27 1961
JAMES R. BROWNING, Clerk

No. [redacted] 14

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

MARVIN S. SLOMAN,
HUBERT D. JOHNSON,
Of Carrington, Johnson & Stephens,
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Dallas 1, Texas,
Attorneys for Appellant.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

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Gospel Army v. City of Los Angeles, 331 U. S. 543 (1947)	3
Market Street Railway Co. v. Railroad Commission, 324 U. S. 548 (1944)	3
Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952)	2
Wichita Falls & S. R. Co. v. McDonald, 174 S. W. 2d 951 (Tex. 1943)	2

United States Code Citations

12 U. S. C. §94	4, 6
28 U. S. C. §1257(2)	2
28 U. S. C. §1291	6

No. 968

In the

Supreme Court of the United States

OCTOBER TERM, 1960

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
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Appellee.

On Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

In his Motion to Dismiss Appeal Appellee characterizes the judgment below as "an interlocutory determination of venue" and as a "determination of a merely interlocutory step in the proceeding." (Motion, p. 2.) Appellee cites no authority in support of this general conclusion. In the lexicon, "interlocutory" means "provisional, only temporary, not final." *Black Law Dictionary, 3rd ed.; Webster New International Diction-*

ary, 2d ed. By Texas law and practice, on the other hand, the judgment of the state court was final and would support a plea of res judicata. *Wichita Falls & S. R. Co. v. McDonald, 174 S. W. 2d 951 (Tex. 1943).* Appellee cites no authority holding that the judgment of the state court was provisional or temporary or anything less than final, and we believe there are no such authorities. In *Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952),* relied on by Appellee, (Motion, p. 3) the Alabama "temporary writ of injunction" was provisional and temporary, and the trial court had continuing jurisdiction and authority to dissolve or modify the temporary decree at any and all times. In the present case, the only court with further jurisdiction or authority over the question herein presented is the Supreme Court of the United States.

Appellee points out (Motion, p. 2) that a judgment appealed from must be "subject to no further review or correction." We agree with this statement. But Appellee seems to infer that the judgment appealed from in the present case is subject to further review or correction. The record in this case clearly negatives this inference. The judgment by the Supreme Court of the State of Texas is a judgment "rendered by the highest court" of Texas "in which a decision could be had." *28 U.S.C. §1257(2).* It is not subject to further review or correction unless such review or correction shall be made by this Court. In any further Texas proceedings the finality of such judgment has to be recognized.

Appellee states (Motion, p. 2) that the "judgment appealed from must be an effective determination of the litiga-

tion." As authority for this statement Appellee cites *Market Street Railway Co. v. Railroad Commission, 324 U. S. 548 (1944)*, and *Arnold v. United States, 263 U. S. 427 (1923)*. The *Market Street Railway Co.* case involved the status of a judgment of the Supreme Court of California between the date of the judgment and the time for filing of a remittitur. In the *Arnold* case the judgment of the Circuit Court of Appeals remanded the cause to the federal district court for trial as to practically all of the issues in the case. Neither of the cited cases is relevant in the present case. In the present case the order has "fully adjudicated rights" and such "adjudication is not subject to further review by a state court". This is the test of finality as announced by this Court in *Gospel Army v. City of Los Angeles, 331 U. S. 543 (1947)*.

Appellee's statement that the judgment appealed from must be an effective determination of "the litigation" does not accurately describe the jurisdictional test declared and applied by this Court. In *Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 (1931)*, the Director of Natural Resources of California had brought suit in the Superior Court of the State of California to enjoin alleged unreasonable waste of natural gas under the California conservation act. Bandini Petroleum Co. sought a writ of prohibition from the District Court of Appeal. Overruling the federal grounds urged by Bandini, the District Court of Appeal denied the writ of prohibition. The Supreme Court of California denied review. This Court held that it had jurisdiction at that stage of the case to review the determination of federal questions entering into the judgment of the state court denying the writ of prohibition. This Court pointed out that it was this "determi-

nation alone that we can now consider". Clearly in this *Bandini* case the judgment denying the writ of prohibition did not result in any ultimate determination of the entire "litigation", but this Court nevertheless had jurisdiction of the federal questions on appeal. The instant case presents a striking parallel to the *Bandini* case, the state court from which this appeal is taken having finally determined that the federal statute *(12 U. S. C. §94)* did not apply to proceedings against national banks in state courts; and it is this determination alone that Appellant is asking this Court to consider. Appellant respectfully submits that under this Court's ruling in the *Bandini* case there is jurisdiction in this Court to review the judgment of the Texas court from which this appeal has been taken.

Appellee further contends that for this Court to take jurisdiction of the appeal in the present case would "militate against the rules heretofore laid down by this Court respecting piecemeal review". (Motion, p. 3.) We respectfully urge that this position of Appellee is not well taken. It is clear in this case that there has been a final adjudication by the Texas court of the federal right asserted by Appellant, and that such federal right will not be involved in any subsequent proceedings in this cause. Appellee's pleading does not suggest that his state court action based on state law would involve any further federal question as to Appellant, and we know of none ourselves. Under the ruling of this Court in the *Bandini* case this Court's assumption of jurisdiction will in no way violate any rule against fragmentary or piecemeal review.

Appellee further argues that this Court's assumption of jurisdiction would violate this Court's policy "against premature constitutional adjudication". This argument is based necessarily on the erroneous premise that the issue is premature now but could be mature or ripe at a later stage. Further proceedings can have no bearing on the maturity or ripeness of the appealed issue, which has been finally adjudicated. Appellee does not argue and can not argue that the state trial court would have the right to alter in any way the final adjudication of the issue. The judgment of the Supreme Court of Texas and its opinion in this case leave no doubt as to the unconditional finality of the adjudication.

Appellee's argument that Appellant might not complain at a later stage if the trial court held in its favor on the merits overlooks the fundamental premise that Appellant would still have lost its valuable federal right as to which there has been a final adjudication. In the *Bandini* case Bandini Petroleum Co. might have prevailed on the merits in the proceeding in the Superior Court of California, but this possibility did not prevent this Court from taking jurisdiction to determine whether or not the Superior Court of California had any right to proceed with the trial on the merits.

We recognize the statutory and judicial policy which prohibits appeals from any decisions which are tenative, informal, or incomplete. But even in the light of this policy we urge the applicability of the exceptional rule declared by this Court in *Cohen v. Beneficial Industrial Loan Corp.*,

337 U. S. 541 (1949). In the *Cohen* case this Court considered the meaning of "final decisions" as used in the related Section 1291 of the Judicial Code. *28 U. S. C. §1291.* The defendant had moved in the district court to require the plaintiff to post security for costs including reasonable attorneys' fees. The district court denied this motion, and the court of appeals reversed. This Court took jurisdiction and affirmed the opinion of the court of appeals. With respect to the appealability of the judgment this Court stated:

> "We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. * * *.
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

These considerations are particularly applicable in the present case. Neither the Texas statute involved nor the federal statute involved in the present case has anything to do with the merits of the case. The right claimed by Appellant on the basis of the express federal statute *(12 U. S. C. §94)* was not an ingredient of the cause of action, or the defenses to it. The claimed federal venue right is separable

from and collateral to the rights asserted in the action. There can be no consideration of such claimed right in connection with the trial of the merits of the action. The order appealed from is a final refusal of the duly claimed right. Appellant's claimed right, aptly, is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

WHEREFORE, Appellee's Motion to Dismiss Appeal should be overruled, and probable jurisdiction should be noted herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on June 26, 1961, I served copies of the foregoing Brief in Opposition to Appellee's Motion to Dismiss Appeal on the Appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee at the following post office addresses:

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Office-Supreme Court, U.S.
FILED
JUN 27 1961
JAMES R. BROWNING, Clerk

No. [redacted] 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961 2

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

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No. 969

In the

Supreme Court of the United States

OCTOBER TERM, 1960

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

Republic National Bank of Dallas, appellant, files this its brief in opposition to the motion to dismiss appeal filed herein by appellee.

ARGUMENT

The principal basis of apppellee's motion is that the Texas decree appealed from is not final. That is not the real question. This case is not complete; no one disagrees with

that. Nevertheless this Court has reviewed a number of cases before they were complete. It has done this in the face of a statutory direction that limits Supreme Court review to "final judgments or decrees." The real question is whether this appeal meets the criteria which allow review before a case is complete.

Although many cases have discussed what these criteria are, none has provided a clear-cut list of principles to be uesd. Appellant feels, however, that some of these principles are revealed by contrasting two types of cases in which decisions for and against review have long been consistent. One type is exemplified in *Clark v. Williard, 292 U. S. 112 (1934)*, which allows review of a state judgment even though there remains a lengthy receivership before the state proceedings actually terminate. The other is demonstrated by *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, 344 U. S. 178 (1952)*, where this Court refused to review a temporary injunction. This Court has consistently granted review in "receivership" cases similar to *Clark v. Williard*. It has consistently refused to review "temporary injunction" cases similar to the *Montgomery* case.

Several differences between the receivership and the temporary injunction situations point out why this is so. Review in a receivership situation usually precedes an extended judicial proceeding, and to postpone a decision until the proceeding is complete might induce error which would be time consuming and costly even if later corrected. On the other hand a temporary injunction usually contemplates

but one additional proceeding, and to put off review until after the second hearing does not allow the same opportunity for compounding error.

Review in the receivership situation is usually requested after a complete trial of all the issues involved. The issues up for review will have been decided after full opportunity for preparation and hearing. By contrast, a temporary injunction is usually granted quickly, before the parties have had a chance to prepare the case thoroughly. It is an order granted for the time being, and in anticipation of a more thorough hearing on the same issues later. Should the later hearing reveal additional facts or issues, it might change the situation enough to create entirely new problems. To review the first hearing leaves the Court open for a review of the *same* question later.

Finally, there is a difference in the purpose of the two proceedings. The receivership-type is intended as a guide by which a later proceeding is to be directed. If it is erroneously decided at the beginning and there is no opportunity to protest, the error will be compounded in the proceeding which follows. The temporary injunction, however, is designed to take care of an emergency and to be superseded once there is a chance for a full hearing. An aggrieved party does not have to appeal to protest an error; he need only wait. The receivership situation contemplates carrying out the decisions reached. The temporary injunction leads only to relitigation.

With these distinctions in mind, we submit that this case is more akin to the receivership situation than to the tem-

porary injunction. The decision of the Texas Supreme Court precedes a long and difficult litigation. Trial on the merits, as shown by appellee's petition, involves an action for $15,000,000 in damages against appellant and 143 other defendants on allegations that each was a party to a common conspiracy with each of the others to defraud the I.C.T. Insurance Company its creditors, stockholders, claimants and the public; that such conspiracy was conceived in May of 1950 and continued until February of 1957. If the error, sought to be reviewed herein, is allowed to stand, appellant will be required to endure this fantastic, multifarious, complex and lengthy litigation at a place two hundred miles from the place where its witnesses reside and its records are located, in violation of its valuable right to be sued where its place of business is located, as provided by the Congress of the United States. The question for review here is one that has already been thoroughly litigated and finally determined insofar as the Texas courts are concerned. The facts relating to venue are undisputed. Nothing to be developed at a trial on the merits can or will shed any further light on the venue question. Each of the parties has been accorded the fullest opportunity to present its case on such question before the courts of Texas. Finally, the proceeding to determine venue is one intended to guide the court in later proceedings. No relitigation is proposed; if there is error here and the impending trial is guided by that error, appellant will have been effectively denied a right granted by Congress to be sued in its home county.

Appellee also implies that to grant review now would be to expand this Court's jurisdiction without Congressional

authorization. That is not true. The Court granted review in *Clark v. Williard, supra*, without that sort of difficulty. The Court would not be extending its jurisdiction; it would simply be giving a sensible interpretation to the word "final" in 28 U. S. C. §1257.

Appellee suggests that if appellant is forced to trial erroneously outside its home county and prevails, it will probably acquiesce in the venue ruling of the Texas Supreme Court. Even should that be so, it is no reason to countenance an erroneous denial of appellant's federal right by the Texas courts. This is an important question, one that is of vital interest to national banks everywhere. Appellant suggests that this Court should review the question in clear and understandable language, so that courts may no longer disregard the plain wording of this Congressional act upon such false reasoning as was given below and as has been given in the erroneous decisions from other states relied upon by appellee.

CONCLUSION

For the reasons stated, appellant Republic National Bank of Dallas requests that appellee's motion to dismiss this appeal be denied and the case be heard on briefs and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June, 1961, I served copies of the foregoing brief in opposition to appellee's motion to dismiss appeal on appellee thereto, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

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None of the persons on whom service is to be made resides five hundred miles or more from me.

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No. M 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal From the Supreme Court of Texas

BRIEF OF APPELLANT

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No. 91

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal From the Supreme Court of Texas

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Texas (R. 365-374) is reported unofficially at 341 S. W. 2d 161. The official report of this opinion has not yet been issued. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, (R. 351-363) is reported unofficially at 331 S. W. 2d 349. There is no official report of this opinion. The trial court delivered no opinion.

JURISDICTION

This action was instituted in the 98th District Court of Travis County, Texas. Appellant national bank asserted its right to have the case transferred to Dallas County, Texas, under 12 U. S. C. §94, a federal statute specifying the venue of suits against national banks. The trial court sustained venue in Travis County, Texas, by authority of Sec. 4(f), Article 21.28, Insurance Code of Texas. The Court of Civil Appeals reversed the trial court's judgment and sustained appellant's position that the federal statute required the suit be brought in Dallas County, Texas. The Supreme Court of Texas reversed the Court of Civil Appeals and affirmed the trial court.

Appellant questioned the validity of Sec. 4(f), Article 21.28, Insurance Code of Texas, as applied to suits against national banks, because of its repugnance to the federal statute. In sustaining venue in Travis County, Texas, the Texas Supreme Court decided in favor of the validity of the Texas statute. Under these facts, jurisdiction of this appeal is conferred by 28 U. S. C. § 1257(2).

Because this Honorable Court has postponed the question of jurisdiction to the hearing on the merits, Appellant has included in this brief a section of the Argument dealing with the question of the finality of the state judgment (pp. 9-16, *infra*).

Plaintiff's petition in this case was filed June 26, 1958. His first amended original petition was filed July 21, 1958 (R. 1). Appellant's Plea of Privilege asserting its right to have venue fixed in Dallas County, Texas, was filed Janu-

ary 3, 1959 (R. 325-337). Another defendant in the same action, Mercantile National Bank at Dallas, filed a similar plea (R. 322-324). The two pleas were consolidated for trial and were heard in the 98th District Court of Travis County, Texas, on February 20, 1959; an order overruling both pleas was entered April 2, 1959. Both national banks gave notice of appeal to the court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas (R. 343-345). All parties to the plea of privilege hearing agreed on April 13, 1959, that the only question involved in the pleas of privilege was whether the federal statutes entitled the defendant national banks to have the case transferred to Dallas County, Texas (R. 345-348).

On December 9, 1959, the Court of Civil Appeals rendered judgment reversing the decision of the trial court in both cases (R. 349-350). Appellee thereupon obtained a writ of error from the Supreme Court of Texas. On November 23, 1960, the Supreme Court of Texas entered judgments in both cases reversing the Court of Civil Appeals and sustaining venue in Travis County (R. 363-364). Both national banks moved for rehearing, and both rehearings were denied on December 21, 1960 (R. 374-375). Appellant herein filed notice of appeal to the United States Supreme Court on March 18, 1961 (R. 377-378); Mercantile National Bank at Dallas filed its notice of appeal to this Court on March 16, 1961 (R. 375-376).

The order of the United States Supreme Court consolidating this appeal with Mercantile National Bank's appeal, allowing two hours for oral argument, and postponing the

question of jurisdiction to the hearing on the merits was entered October 9, 1961 (R. 381).

STATUTES INVOLVED

The text of Section 4(f), Art. 21.28, Insurance Code of Texas, the Texas statute which was held applicable to national banks in this case, is as follows:

> "(f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all action or proceedings instituted after the commencement of deliquency proceedings by or against the insurer or receiver."

Article 21.28 of the Insurance Code of Texas regulates the liquidation, rehabilitation, reorganization, and conservation of insurance companies. It is found in official edition in the *General and Special Laws of Texas, Acts 54th Legislature, Regular Session, 1955, Ch. 267, p. 737.* (Section 4(f) is at p. 742). Sec. 1(b) of that Article defines "delinquency proceeding" as follows (p. 738 in the official edition):

> "(b) 'Delinquency proceeding' means any proceeding commenced in any court of this State against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer."

The federal statute involved is 12 U. S. C. §94. It reads as follows:

> "§94. Venue of suits
>
> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county

> or city in which said association is located having jurisdiction in similar cases."

The wording used in this section was added to §5198, Rev. Stat. (1873), by Ch. 80, §1, Act of February 18, 1875, found at 18 Stat. 320.

QUESTIONS PRESENTED

1. Are the provisions of 12 U. S. C. §94 prescribing venue in actions in state and federal courts against national banks mandatory as to actions in federal courts, and only permissive as to actions brought in state courts?

2. May a state statute relating to venue of suits brought by or against the receiver of an insurance company override the federal law prescribing venue of actions against a national bank?

STATEMENT

ICT Insurance Company, a Texas corporation, was placed in liquidation and a receiver was appointed under the special statutes covering such proceedings. The receiver brought this action in Travis County (Austin) Texas jointly against one hundred forty-four defendants. Included among the defendants were this appellant, Republic National Bank of Dallas, and Mercantile National Bank at Dallas, appellant in No. 90. The receiver alleged all defendants jointly conspired to defraud ICT Insurance Company, its creditors, policyholders and shareholders. Fifteen million dollars in alleged damages are sought against all defendants jointly and severally.

Confronted with this vast, complicated, expensive and unwieldy lawsuit, the two Dallas national banks each sought

under 12 U. S. C. §94 to have the suit transferred as to them only to Dallas County, Texas. To accomplish this they each filed and urged a plea of privilege, the procedure prescribed in Texas to attack improper venue. A separate trial is held, and the parties may even demand a jury. The parties, however, submitted the issue of venue to be heard by the judge of the 98th Judicial District Court of Texas, located in Travis County, the court in which the ICT suit is pending. The court heard both pleas of privilege together and overruled them. Both national banks appealed from the trial court's judgment on the venue issue to the proper intermediate appellate court, the Court of Civil Appeals at Austin.

The Court of Civil Appeals reversed the trial court's judgment and ordered the suit as to each national bank transferred to Dallas County; on further appeal by the receiver to the Supreme Court of Texas, the judgment of the trial court was sustained. Unless the Honorable Court rules now that the federal statute in question requires that the suit as to appellants be transferred to Dallas County for trial, it will be tried in Travis County, Texas. Trial on the merits is being held in abeyance pending decision of the United States Supreme Court.

SUMMARY OF ARGUMENT

As to jurisdiction: The only question involved in this appeal is whether federal law requires a state court to transfer a proceeding against a national bank to the county in which the bank is located. Appellant national bank has asserted this right and it has been denied by the Supreme Court of Texas. The judgment of the Texas Supreme Court is a final

judgment as that term has been defined by this Honorable Court for jurisdictional purposes. The only question involved —that of venue—has been completely disposed of. It will not be considered again by the Texas courts. Since this question is not subject to any further determination in the state courts, this appeal is not subject to many of the objections usually made to Supreme Court review of interlocutory matters. Further, this matter precedes an extended and difficult litigation. If the erroneous decree of the Texas Supreme Court is allowed to stand, error will infect a complex judicial proceeding. It will cause serious inconvenience and expense to the litigants if that error is to be later corrected. In the areas of receivership and accounting the United States Supreme Court will review final state determinations which precede an extended state proceeding. This appellant claims that the same reasoning which allows review in those cases requires review in this one. Further, if this appeal is not heard at this time, appellant will be forced to submit to trial on the merits outside its county and will thus be irreparably deprived of an important federal right. Irreparable injury to appellant can only be prevented by review at this time. Authority sustains the jurisdiction of the United States Supreme Court to review questions at that point in the litigation where a losing party would be irreparably injured if review were unavailing. The Texas courts have had full opportunity to decide this question and have decided it adversely to appellant's claimed federal right. Failure to review at this time will not provide any further opportunity for the Texas courts to decide this question and will only result in irreparable injury to appellant.

As to the Merits: 12 U. S. C. §94, is mandatory when applied to venue of actions against national banks in state courts. It is mandatory on its face. The statute allows a choice between state and federal courts for suits against a national bank, but once that choice is made venue in either system is prescribed and mandatory. A mandatory venue requirement on state courts is the only interpretation of that statute consistent with the federal government's policy that its national banking system shall be uniformly treated in all parts of the country. Likewise, mandatory venue is the only interpretation consistent with another federal policy, that which prevents undue interference by states in the operation of national banks.

Federal decisions, including two from the United States Supreme Court, have unanimously interpreted the statute mandatorily. The better-reasoned state decisions have done likewise. *Casey v. Adams, 102 U. S. 66 (1880)*, holding that the predecessor of 12 U. S. C. §94, is inapplicable to actions "local in their character," does not prevent a mandatory interpretation in this case. The Texas Supreme Court expressly refused to decide this case on the basis of its being a local action. Further, this case is *not* a local action.

The Texas Supreme Court decided this case on erroneous reasoning. 28 U. S. C. §1348, has no effect on 12 U. S. C. §94. §1348 applies only to actions involving national banks in federal courts, and is intended to limit jurisdiction of such actions. State authority cited by the Texas Supreme Court in support of its decision is wrong, and is not binding on this Court. If a mandatory venue requirement in 12

U. S. C. §94, evokes difficulties in its application, that is a matter for Congress or the state legislatures to remedy. It should not be remedied in the courts.

The Texas Supreme Court states that 12 U. S. C. §94 does not deprive the state courts of "jurisdiction" of suits against national banks. Appellant agrees, and points out that this is not a question of state jurisdiction, but of venue. The Texas Supreme Court expressly refuses to follow *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, and distinguishes *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2nd Cir. 1936), cert. den. 298 U. S. 677*. Appellant contends those cases should have governed the Texas Supreme Court's decision. The Texas Supreme Court states that this is a matter "wholly within the domain of state interest," and insulated from federal control. Appellant contends that no matter relating to national banks is insulated from federal control.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT HAS JURISDICTION OF THIS APPEAL BECAUSE THE JUDGMENT OF THE SUPREME COURT OF TEXAS IS FINAL AS TO VENUE, AND BECAUSE FAILURE TO HEAR THIS APPEAL AT THIS TIME WILL RESULT IN APPELLANT'S BEING IRREPARABLY DENIED A RIGHT GRANTED BY FEDERAL LAW.

The question which arises on the issue of jurisdiction is whether the judgment of the Supreme Court of Texas is a final judgment or decree as required by 28 U. S. C. §1257.

All parties agreed below that the only issue involved in the hearing on the pleas of privilege was whether the national banks were entitled under the cited federal statute to have the case transferred to the county in which they were located (R. 347-348). Eventually the case reached the Supreme Court of Texas, and that court held that venue should remain in Travis County (R. 363-365). In so holding it said (R. 365-366, 341 S. W. 2d 162):

> "These venue cases present but a single question of law which may be disposed of in one opinion.
>
> "The question presented is: Does Title 12 U.S.C.A. §94, give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f) of the Insurance Code, the right to have an action against it tried in the county of its domicile?"

As the case now stands, unless this Honorable Court holds otherwise, the action will proceed to trial in Travis County, Texas, on the merits, subject only to possible review thereafter by the United States Supreme Court on the question whether appellants have the right under the cited Act of Congress to have it tried as to them in Dallas County. So far as all Texas courts are now concerned, the venue question has been decided by a final judgment of the Texas Supreme Court.

Is this judgment of the Supreme Court of Texas "final" as the United States Supreme Court has defined it for jurisdictional purposes? The decisions of this Court in which this issue has been considered have not been arbitrary in requiring that all proceedings be complete before review will be

granted. The Court has instead followed a policy of allowing review before a case is complete in certain situations where cogent reasons dictate that review should be granted. No rigid rules have been set up. Rather the court has looked to various considerations of convenience and necessity to determine when it would review and when it would not. The factors which in the past have permitted Supreme Court review are present in this case.

Some of the factors are attributable to a concept which for want of a better name can be called convenience. The convenience of the Court is one factor. How can the Court keep from being swamped with appeals on interlocutory orders? One way is to refuse those appeals which might better be heard later. Many interlocutory decrees come in this category. A temporary injunction is a good example. In *Montgomery Building and Construction Trades Council v. Ledbetter, 344 U. S. 178 (1952)*, review of an Alabama temporary injunction was sought. The Supreme Court refused, pointing out that a temporary injunction could just as well be converted into a final decree before an appeal is attempted. Even had the Supreme Court reviewed the *Montgomery* case, the decree granting the temporary injunction would have been subject to another determination in the state court when it later determined whether the temporary injunction should be made permanent. It would be a vain act for the United States Supreme Court to review a state interlocutory decree only to have the questions it reviewed become moot by a later and final determination by the state court. Further, the temporary injunction is usually secured quickly,

often before the parties have an opportunity fully to develop all the issues. Evidence considered material in the granting of the temporary injunction might take on a different complexion at the later hearing where all facts are fully developed. There are many instances where a temporary injunction has been granted and a permanent injunction is denied in the same court.

This case is different. The question determined on the venue appeal by the Texas Supreme Court may not be lawfully determined by the Texas courts in a trial on the merits or an appeal therefrom contrary to such Texas Supreme Court decision. The question of venue has been fully developed; no further hearing thereon is now permitted in the Texas courts. The Texas Supreme Court decision on venue is one which is based on law as laid down by that court and is not one subject to change on some fact question.

Convenience of the litigants and the state courts is another important factor which appears to have influenced this Court in granting review. Certain types of decrees contemplate extended proceedings afterward. Such a decree is one after which an extended receivership or accounting is to be carried out. The United States Supreme Court has often granted review in such cases, even though technically the decree reviewed does not complete the proceedings below. One such "receivership" case is *Clark v. Williard, 292 U. S. 112 (1934)*; another was *Radio Station WOW v. Johnson, 326 U. S. 120 (1945)*. The *Johnson* decree contemplated an extended accounting. If the Court refused review on a federal question until all the proceedings were complete, an

extremely lengthy and complex proceeding might thereby be infected with error. In order that the later proceedings might not be based on an incorrect view of applicable federal law the Court has granted review before the accounting or receivership is terminated. This is demonstrated by comparing the "receivership" or "accounting" situation with the temporary injunction. The temporary injunction only contemplates one additional proceeding, and in that the questions presented more than likely are the same as those raised at the original hearing. There is no serious inconvenience to the litigants or the state courts if review is denied. But in an extended receivership or accounting, there might be serious inconvenience if the whole proceeding had to be undertaken a second time because of error at first. This Honorable Court has recognized this and has granted review in such situations.

The trial of this case, as is evidenced by the plaintiff's 345 page complaint will be exhaustive and exhausting, lasting over an extremely long time difficult to estimate. There are one hundred forty-four defendants, and each defendant is alleged to have conspired with each of the other one hundred and forty-three defendants to defraud ICT. This, if true, would require proof of conspiracies running into astronomical figures. If venue here is improper, the error will infect an extremely lengthy and complex state proceeding. Great expense, inconvenience and irreparable injury will result to the state courts and the litigants if the error is not corrected at this time.

Necessity, too, plays its part in the granting of review. There are certain situations in which a question raised before

completion of a case requires an answer before the case continues. In *Republic Natural Gas Company v. State of Oklahoma, 334 U. S. 62, 68 (1948)*, the Court laid down this rule:

> "There have been instances where the court has entertained an appeal of an order that otherwise might be deemed interlocutory *because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.* (Emphasis supplied.)

A case arising from the federal courts, *Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 (1949)*, considered a similar problem. The *Cohen* case was a stockholder's derivative action. At issue was an order requiring the stockholder-plaintiff to give $125,000 as security for costs and attorney's fees to be incurred by the defendant. The cost deposit was a prerequisite to allowing him to prosecute his lawsuit. This Court held the order reviewable in this language (at *337 U. S. 546-547*):

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated * * *. We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

These two cases appear directed at situations very similar to the one in this case. Venue is a separate right, not involved at all in the merits of the case. Nothing relating to the merits

is to be determined in the venue determination, and nothing relating to venue is to be determined in the merits. Venue is independent of the cause itself, separable, and collateral to it. It is a claimed right, finally determined. It is an extremely important right, particularly in a situation such as is present here. The appellant will be irreparably deprived of its federal venue right if review is not granted. Appellant believes that the theories set out in the *Cohen* and *Republic Natural Gas Company* cases apply directly to this case, and require that it be reviewed.

The *Cohen* case, however, continues with a telling distinction:

> "But we do not mean that every order fixing security is subject to appeal. Here it is the *right* to security that presents a serious and unsettled question. If the *right* were admitted or clear and the order involved only an exercise of discretion as to the amount of the security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." (Emphasis supplied.)

This statement makes the rationale of the *Cohen* case somewhat clearer. The order in *Cohen* is reviewable not only because it is separate from the merits and collateral to them, but also because it is important. It involves the existence of a *right*. Were the existence of the right not involved, and were it simply a question involving judicial discretion, review would not have been granted. Likewise, were it an order subject to later determination by the lower court, review would not be allowed. These factors, too, apply to this case. In the case at bar there is a federal *right* being asserted. It is not a question of discretion; it is purely a question of the

existence of the right. Too, there is no later determination of venue possible in this case.

The courts of Texas have spoken with finality on the question of venue and there is no review now to be had except by this appeal. They have spoken in such a way as to deny this appellant its federal venue rights. There is no need to hope that the Texas courts will somehow see their error and remedy the defect if it goes to trial on the merits. The Texas Supreme Court's decision of it is now *res adjudicata*. The Texas courts are now bound by this final decision and will not reconsider it. To wait for a final decision on the merits of this case will be only to deprive appellant effectively and irreparably of a valuable federal right.

In summary, appellant submits this is a final decree as that term has been defined by this Honorable Court for jurisdictional purposes.

II.

THE VENUE OF THIS ACTION AGAINST APPELLANT NATIONAL BANKS LIES IN DALLAS COUNTY, TEXAS, BECAUSE 12 U.S.C. §94 MAKES IT MANDATORY THAT A SUIT SUCH AS THIS BE BROUGHT IN THE COUNTY WHERE THE BANK IS LOCATED WHEN THE BANK CLAIMS SUCH RIGHT. THIS FEDERAL REQUIREMENT OVERRIDES ALL CONTRARY STATE LAWS.

The only question presented on the merits of this appeal is whether the venue requirement of 12 U. S. C. §94 is mandatory when applied to an action such as this one brought in a

state court against a national bank. The Supreme Court of Texas held that the provisions of such act are not mandatory, and that the Texas statute authorizing suits by or against a receiver of an insurance company in liquidation to be brought in Travis County, Texas, is controlling in suits against national banks. Appellant submits the Texas Supreme Court erred in holding that the state statute is controlling and overrides the federal statute.

About one fact there can be no serious dispute: if 12 U. S. C. §94 is mandatory, it will override any state statute contrary to it. The Supreme Court of Texas has recognized this when it held (R. 369, *341 S. W. 2d 164*):

> "If, under federal decisions, United States Revised Statute §5198, 12 U.S.C.A. §94, is applicable here, then all state statutes in conflict therewith must yield."

Also (R. 373, *341 S. W. 2d 166*):

> "Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice."

The quotations show that there is no serious challenge to the proposition that the federal government has the *power* to make its venue requirements mandatory on state courts where national banks are involved. It is now to be determined whether 12 U. S. C. §94 is an *exercise* of that power. The appellant submits that it is, and that the mandatory nature of 12 U. S. C. §94 is revealed in many ways. It is revealed in the wording of the statute itself, in its history, and in a study of the cases which have spoken on this subject, principally those of the United States Supreme Court and

other federal courts. It is revealed most clearly by applying to this situation the federal government's historic principle that national banks will be uniformly treated wherever they may be. Finally, an examination of the reasoning on which the Texas Supreme Court's opinion is based shows clearly that such court failed to take these factors into account in construing this statute. It is for these reasons that appellant seeks a reversal of the Texas Supreme Court's decision.

Appellant will first present in some detail the various reasons which require that 12 U.S.C. §94 be construed as mandatory on state courts. It then proposes to show that the Texas Supreme Court erroneously failed to respect and follow that reasoning.

A. THE VENUE REQUIREMENT OF 12 U.S.C. §94 IS MANDATORY WHEN APPLIED TO STATE COURTS.

(1) It is mandatory on its face.

12 U.S.C. §94 reads as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Assuming a litigant wants to sue a national bank, this section gives him two choices. If federal court jurisdiction exists, he *may* sue in a federal court. Which federal court? The statute sets it out clearly: the one "* * * held within

the district in which such association may be established." Or, he *may* sue in a state court. Which one? This, too, is set out in the statute: the one having jurisdiction in similar cases "* * * in the county or city in which said association is located." This plain language cannot be arbitrarily disregarded.

The purpose of 12 U. S. C. §94 has been much discussed, especially when it is considered in conjunction with certain other sections of the United States Code, particularly §24 (4) of Title 12, and §1348 of Title 28. Whether or not §94 also encompasses jurisdiction, its application to venue is crystal clear. Were it not designed to cover venue the words relating to venue would not have been included. Each system of courts—federal or state—has its own rules for venue in ordinary cases. Had Congress intended that a suit against a national bank be treated as an ordinary case, it would simply have provided jurisdiction in either federal or state courts and said nothing about venue. Instead Congress chose to speak of venue. It said, in effect, that a suit against a national bank is not an ordinary suit, but is to be governed by special rules. It is not the place of the courts to say that Congress intended the words in §94 relating to venue to have no meaning. In fact, the reverse is true. It is an accepted principle of statutory construction that a court in construing a statute should, if possible, give effect to every clause and word in it. *United States v. Menasche, 348 U. S. 528 (1955); Inhabitants of Montclair v. Ramsdell, 107 U. S. 147 (1883).* It is possible to give effect to every clause and word of 12 U. S. C. §94, but only if the section is construed as establishing mandatory venue.

This problem was considered previously in *Cadle v. Tracy, 4 Fed. Cas. 967, No. 2279 (Cir. Ct. S. D. N. Y. 1873)*, a case which construed a predecessor of the present 12 U. S. C. §94. The predecessor statute was §57 of the National Banking Act of 1864, 13 Stat. 116; it is quoted in full on p. 42 of this brief and for all practical purposes was the same as the current §94. The National Banking Act of 1864 also contained §8 [presently in 12 U. S. C. §24(4)] which authorized national banks to sue and be sued "* * * in any court of law and equity." It was apparently contended that the word "may" in the venue statute was permissive when applied to state courts, and that venue was governed by state law because of §8. This contention was answered in the following language (at *4 Fed. Cas. 972)*:

> "It is true, that the word used is 'may', and that that word is used, in the section, in reference to both federal courts and state courts. But, that word cannot, in regard to state courts, be regarded as permissive or enabling, because under the 8th section, a state court in the county or city in which the association is located having jurisdiction in similar cases, might have jurisdiction of a suit against the association, if the state authority so provided; and, therefore, the provision of the 57th section, in regard to state courts, if merely permissive or enabling, is surplusage, and contains no more than was already contained in the 8th section. * * * But there is a clear indication that the jurisdiction of such suits by state courts was intended to be confined to the state courts specified. If this is not so, there was no need of saying anything about state courts, in the 57th section of the Act of 1864. The state courts specified in that section are already covered by the 8th section of the same Act. It cannot be supposed that Congress did not intend that the provision in the 57th section in regard to state

courts should have some meaning, and it can have none unless as a restriction on the general provision in regard to jurisdiction found in the 8th section."

It was then held that the New York state courts had no "jurisdiction" of a suit against an Alabama national bank. The predecessor of 12 U. S. C., §94, was construed as mandatory on state courts.

It has been urged that this statute is permissive as to venue because the word "may" is used rather than "must." There is a simple answer to that contention. It is true "may" implies a choice; plaintiff may choose between suing a national bank in a federal court or a state court. If he chooses a federal court the venue is set out in the statute; there is nothing permissive about it. The same is true if he chooses a state court.

If 12 U. S. C. §94 is read logically and sensibly, it is clear that venue in both federal and state courts is mandatory. To construe it permissive as to state venue is completely to disregard eleven words in the statute. If a court is to respect the will of Congress, it cannot disregard those eleven words.

(2) A mandatory interpretation accords with the national government's policy that national banks will be uniformly treated in all parts of the country, and allowed to carry out their functions without hindrance by the states.

It is vital to the welfare of the United States that there be a strong national banking system. To the end of establishing such a system, Congress has historically followed

the principle that national banks must be uniformly treated in all sections of the country. A rule has also developed which prevents a state from unreasonably interfering in the operation of the national banking system. These principles antedate the present National Banking Act by a number of years. In the leading case of *McCullogh v. Maryland, 4 Wheat 316 (U. S. Sup. Ct. 1819)*, Chief Justice Marshall struck down an effort by a state to tax the Second Bank of the United States. To the same effect was *Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. Sup. Ct. 1824)*. The same principles of federal supremacy continued after the present system of national banks was established in 1863. The question of state interference with the national banking system arose again in *Farmers & Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875)*. There a national bank brought suit on a note in a New York state court. The defendant contended the note was usurious. As the National Banking Act then existed it allowed the maximum rate of interest chargeable by a New York national bank to be determined by reference to New York law. New York law also provided that the penalty for usury was forfeiture of the total obligation, while the National Banking Act's penalty for usury was forfeiture of only the interest. It was contended that since New York law determined the maximum rate of interest it also determined the penalty. The Supreme Court held the proper determination of the penalty was under federal [redacted] olding it said (at *91 U. S. 33-34*):

> "The national banks organized under the Act are instruments designed to be used to aid the government in

> the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.
>
> "Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the Constitutional Laws enacted by Congress to carry into execution the powers vested in the General Government'."

The *Dearing* case provides a good example of the manner in which the federal government has chosen to administer its national banking system. The rate of interest was specifically left to the determination of the respective states. With the proviso that no state could establish an interest rate which discriminated against national banks, it was apparently felt that leaving this matter to the states could not unduly burden national banks. On the other hand, the *penalty* remained under federal control. The New York rule forfeiting the whole obligation would have unduly burdened national banks in New York and would have destroyed uniformity in the banking system.

There are other decisions of this Court which reflect these principles. Referring to the National Banking Act of

1864, there is the following language from *Cook County National Bank v. United States, 107 U. S. 445, 448 (1883)*:

> "We consider that Act as constituting by itself a complete system for the establishment and government of national banks, * * *."

In *Van Reed v. People's National Bank, 198 U. S. 554, 555 (1905)*, the following was said:

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law making power of the government may permit."

These references to the "complete system" set up for the operation of national banks, their national character as quasi-public institutions, and the inhibition on state interference indicate that a state's ability to enforce its laws on a national bank is limited. Even a state's public policy, otherwise salutary, must yield in face of the federal government's determination to have a uniform and unhindered national banking system. In *Davis v. Elmira Savings Bank, 161 U. S. 275 (1896)*, it was contended that the public policy of New York ought to prevent the application of federal law in distributing the assets of an insolvent national bank. This Court held, however, that it preferred a policy in favor of all the people of the United States, which would assure

uniformity of treatment for national banks and stimulate confidence in them.

How do these principles affect the application of 12 U. S. C. §94 to venue in state courts? This appellant, of course, does not concede that the words of this section permit any interpretation other than a mandatory one. If they do, an interpretation should be made which is most in accord with the broad principles here set out. What interpretation will do that? It is the one which will assure uniformity of treatment for national banks in all parts of the country, and a minimum of interference in their operation by the states. Congress, it is true, has seen fit to allow the states some authority over national banks. As one manifestation of this, state courts have been allowed to entertain suits involving them. Subject to the supervision of the United States Supreme Court, no state can unreasonably interfere with or harrass the national banking system simply by possessing jurisdiction of such suits. This grant to the states, however, stops short of allowing them complete freedom in its exercise. If state courts are to hear suits against national banks, they must be heard in the national bank's home city or county.

Why is it reasonable so to limit this grant to the states? Uniformity of treatment is one answer. Venue rules vary greatly from state to state. In Texas it is probably safe to say that under some Texas venue rule a national bank in Dallas or Houston could be sued in any of the state's 254 counties, some of which would be hundreds of miles away

from the bank's only place of business. El Paso, Texas, is 809 highway miles from Texarkana, Texas; there are national banks in both cities. It could seriously hinder the operations of any national bank if several of its principal executive officers and many of its records were required periodically to be dispatched to distant counties in order to defend litigation. In other states such varied venue possibilities might or might not exist; in branch-banking states, the existence of branches would do much to alleviate that problem. If state venue were followed, the result would be a hodge-podge with national banks in one state subject to considerably more difficulty than national banks in another. To apply mandatory federal venue is to replace that hodge-podge with uniformity.

Likewise, this case is a good example of just the sort of harrassment Congress was attempting to avoid. Republic National Bank of Dallas is sued along with 143 other defendants in a claimed multi-million dollar conspiracy suit brought at a point almost 200 miles from the bank's only office. The tria. could conceivably last many months. The suit must be defended; its magnitude—even if the claim is unfounded—requires that the bank give it the same careful attention as if it were meritorious.

If the national government's policy toward the national banking system is to be maintained, the venue provision of 12 U. S. C. §94 must be construed as mandatory on suits in state courts.

(3) A mandatory interpretation is supported by decisions of this court and other federal courts, as well as the better-reasoned decisions from state courts.

This Court has twice addressed itself to the problem of whether the venue provisions of 12 U. S. C. §94 (or its predecessors) are mandatory on state courts. The earlier case was *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*. There a North Carolina national bank was sued in the state court of Cleveland County, a county other than the one in which it was located. The bank did not question venue at the trial in Cleveland County, but waited until appeal to claim that right. This Court held that the bank had waived its right to claim venue in its home county by not raising it at the trial level in the following language (at *132 U. S. 144-145)*:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. Bank v. Pahquioque Bank, 14 Wall. 383, 394; Crocker v. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, *it is sufficient that it was granted by Congress, and if it had been claimed by the defendant, when appearing in the superior court of Cleveland County, must have been recognized.*" (Emphasis supplied.)

The case was decided on the basis of waiver, but in so deciding the Supreme Court added what it felt was the proper

interpretation of 12 U. S. C. §94's predecessor. (The predecessor, §5198, Rev. Stat. (1873), contained for these purposes the same wording as the present one.) The Court held that if the bank had claimed its right to be sued in its own county, that right *must* have been recognized. There has been no retreat from this position.

In fact, it was reiterated in a later case, *Cope v. Anderson, 331 U. S. 461 (1947)*. This case did not directly involve the problem at hand. It arose from a suit to assess the shareholders of an insolvent Kentucky national bank. The question was whether the suit was barred by the Ohio statute of limitations. Application of Ohio's statute of limitations depended on where the cause of action arose. This Court held that the cause of action arose in Kentucky, and in so holding made the following statement (*331 U. S. 467*):

> "Many provisions of federal law make national banks, in important aspects peculiarly local institutions. See 12 U.S.C. §§30, 33, 34a, 36, 51, 67, 71, 12 U.S.C.A. §§30, 33, 34a, 36, 51 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the state in which it is established or located, 28 U.S.C. §41 (16), 28 U.S.C.A. §41 (16), *and in that district alone can it be sued.* 12 U.S.C. §94, 12 U.S.C.A. §94." (Emphasis supplied.)

Once again the Court expressed itself on this issue in a way consistent with a mandatory interpretation.

Lower federal courts have also addressed themselves to the venue aspects of 12 U.S.C. §94. Of course when a case arises in the federal courts state venue is not directly involved. What is involved is the interpretation of the statute. If it is mandatory as to federal courts there is nothing in its lan-

guage to indicate it is other than mandatory on state courts. The federal courts have consistently held the venue provisions of 12 U. S. C. §94 mandatory, and this interpretation of the statute's intent controls the interpretation of the state venue portion as well.

Most recent of these federal cases is *Buffum v. Chase National Bank, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952).* There the plaintiff filed suit against a New York national bank in a federal district court in Illinois. The court held that—absent waiver—suit against the national bank could be maintained only in the place of its establishment. It also held that no later enactment had by implication repealed §94. The United States Court of Appeals affirmed an order dismissing for want of proper venue.

To much the same effect was *Leonardi v. Chase National Bank, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677.* Unlike *Buffum, Leonardi* concerned which of two federal judicial districts within the same state was proper. The defendant national bank had its main office in the Southern District of New York; it was sued in federal court in the Eastern District of that state. Although the bank had a branch in the Eastern District it was nevertheless held that proper venue lay only in the Southern District.

International Refugee Organization v. Bank of America, 86 F. Supp. 884 (S.D. N.Y. 1949), was also a suit against an out-of-state national bank in a federal district court. The suit was dismissed because of improper venue; *Cope v. Anderson, supra,* was cited as authority. *Schmidt v. Tobin, 15 F. Supp. 35 (D.C. Nev. 1935),* involved a similar question.

The court, citing—among others—*First National Bank of Charlotte v. Morgan, supra,* and *Cadle v. Tracy, supra,* held that a national bank may not be sued without its consent outside the state of its domicile.

In addition to this federal authority the courts of several states have construed 12 U. S. C. §94 (or its predecessors) as mandatory. Earliest was Massachusetts. *Crocker v. Marine National Bank, 101 Mass. 240, 3 Am. Rep. 336 (1869),* involved a suit against a New York national bank in a Massachusetts state court. The statute in question was §57 of the National Banking Act of 1864, 13 Stat. 116 (quoted in full on p. 42 *infra*). In deciding venue was improper in Massachusetts, the court held (at *101 Mass. 242, 3 Am. Rep. 338*):

> "This section manifests the intention of Congress that each of these associations should be sued, either in the federal or in the state courts only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases."

In 1929 the courts of New York began to rule that the venue requirement of §94 was mandatory in that state. Before that time *Cooke v. State National Bank, 50 Barb. 339 (Sup. Ct. N. Y. 1867), affirmed 52 N. Y. 96, 11 Am. Rep. 667 (1873); Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508 (1880),* and *Talmadge v. Third National Bank, 91 N. Y. 531 (1883),* had held that suits against national banks in New York state courts were not governed by

federal venue rules. *Raiola v. Los Angeles First National Trust & Savings Bank, 233 N. Y. S. 301, 133 Misc. 630 (City Ct. N. Y. 1929)*, reversed the former position. Since that time other New York cases have followed *Raiola* and held §94 mandatory. They are: *Crofoot v. Giannini, 196 Misc. 213, 92 N. Y. S. 2d 191 (Sup. Ct. N. Y. 1949); Robinowitz v. Kaiser-Frazer Corp., 198 Mis. 312, 96 N. Y. S. 2d 638 (Sup. Ct. N. Y. 1950)*; and *Chaffee v. Glens Falls National Bank & Trust Co., 204 Misc. 181, 123 N. Y. S. 2d 635 (Sup. Ct. N. Y. 1953), affirmed 283 App. Div. 694, 128 N. Y. S. 2d 539 (1954), appeal to Ct. App. denied, 283 App. Div. 793, 129 N. Y. S. 2d 237 (1954)*. The *Raiola, Giannini and Glens Falls* cases cite *First National Bank of Charlotte v. Morgan, supra*, for their holding. The *Glens Falls* case presented a somewhat peculiar situation. The court construed 12 U. S. C. §94 as mandatory but refused to change venue to the national bank's county because the New York Supreme Court (in which the action was brought) is a court of statewide jurisdiction and is theoretically "in" every county in the state. This reasoning may be applicable in New York but not in Texas, where the courts of Travis County and particularly the district court in which this suit is filed have no jurisdiction in any other county.

In 1935 the North Dakota Supreme Court applied 12 U. S. C. §94 as mandatory, and refused to entertain suit in a North Dakota state court against a Minnesota national bank. It cited the *Morgan* case, *supra*, as well as the *Cadle* and *Raiola* cases, *supra*. *Burns v. Northwestern National Bank of Minneapolis, 65 N. D. 473, 260 N. W. 253 (1935)*.

Recently California, too, changed its position. An early case had refused to sustain a California national bank's contention that §5198, Rev. Stat. (1873), a predecessor of §94, required that a suit brought against a national bank outside its county be transferred to the bank's county. *Fresno National Bank v. Superior Court, San Joaquin County, 83 Cal. 491, 24 Pac. 157 (1890).* In 1952, however, *Monarch Wine Co. v. Butte, 249 P. 2d 291 (Dist. Ct. App. Cal.),* considered the problem again and determined that §94 was mandatory, based on the *Morgan* decision of this Court the federal decisions cited above, and the authority from Massachusetts, New York, and North Dakota.

In 1958 the Supreme Court of Washington construed §94 as mandatory, following *Monarch Wine Co. v. Butte, supra. Zarbell v. Bank of America, 52 Wash. 2d 549, 327 P. 2d 436 (1958).*

In examining these authorities, however, there are two further points which should be considered. First is the contention that a number of these cases are distinguishable because they involve litigation against an out-of-state national bank. It is true that of the cases cited above, only the two California cases, the *Glens Falls* case and *First National Bank of Charlotte v. Morgan,* involve an in-state national bank. (*Cope v. Anderson* did not squarely present the issue.) The rest involve out-of-state banks. This, however, is not necessarily a valid distinction. There are two bases upon which litigation against an out-of-state national bank could be terminated: because the bank is not doing business in the state where suit is brought, or because of the federal venue

rule. In evaluating authority, we must look to the basis upon which each decision was made. In each of the cited cases it was made, not because of the national bank's failure to engage in sufficient activity in the state of suit, but because of the federal venue rule. In *Bank of America v. Whitney Central National Bank, 261 U. S. 171 (1923)*, on the other hand, it was held that a New York federal court had no jurisdiction because the defendant national bank, located in Louisiana, was not doing business in New York. This disposed of the case on jurisdictional grounds, and the United States Supreme Court expressly refused to consider venue. If a case such as *Whitney Central* is disposed of because of the national bank's failure to carry on business activity within the state of suit, Appellant agrees that there has been no ruling on the applicability of §94. If, however, a court in deciding such a case determines it solely on the basis of the federal *venue* rule, that case is good authority for interpreting §94. The cited cases interpreting §94 cannot be distinguished on that basis.

Next we will consider the applicability of *Casey v. Adams, 102 U. S. 66 (1880)*. This Court held there that the predecessor of §94 (Sec. 5198, Rev. Stat. 1873), applied only to transitory actions, not to such actions as are by law local in their character. It continued that local actions are "in the nature of suits *in rem*, and are to be prosecuted where the things on which they are founded is situated." There are two good reasons why the doctrine of *Casey v. Adams* does not apply in this case. First, the Supreme Court of Texas ex-

pressly refused to decide this case on that basis, saying instead (R. 369, *341 S. W. 2d 164*):

> "It is unnecessary to our decision to determine whether this particular action is local or transitory in nature."

Second, this is not a local action. A local action is one that must be brought in one particular court—and that court only—because of the geographic proximity of a particular thing involved in it. Texas has defined a "local action" as one which would only have arisen in one place, distinct from a transitory action which might have arisen anywhere. *Pegram v. Owens, 64 Tex. 475 (1885); Parker v. Mather, 59 S. W. 2d 961 (Tex. Civ. App. 1933, err. ref.); Employers' Casualty Co. v. Ponton, 41 S. W. 2d 147, 149 (Tex. Civ. App. 1931, no writ history.)* In *Texas & Pacific Railway Co. v. Gay, 86 Tex. 571, 589, 26 S. W. 599, 605 (1894)*, the following definition was given by the Texas Supreme Court:

> "'* * * when the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, * * *."

How can it be said that an action involving 144 defendants and initiated by a petition requiring 322 pages of printed record arose only in one place? This action arose all over the map if the plaintiff's allegations are to be accepted. Nor is this a statutory local action. Section 4(f), Article 28, V. A. T. S. Insurance Code, the Texas statute in issue in this case, simply permits suits brought by the receiver of an insolvent insurance company to be brought in the court where delinquency proceedings are pending. Under Section 1(b),

Article 21.28 of the same Insurance Code, a delinquency proceeding may be "commenced in *any* court *of this State* * * *." There is no requirement that a delinquency proceeding be brought in Travis County nor that it be maintained in geographic proximity to a *res* or thing; only that new lawsuits be brought where the delinquency proceeding is pending.

B. THE DECISION OF THE SUPREME COURT OF TEXAS WAS BASED ON IMPROPER REASONING AND AUTHORITIES.

The Supreme Court of Texas has apparently advanced five reasons for its holding that 12 U. S. C. §94 is inapplicable. Most important is its contention that 28 U. S. C. §1348 requires a permissive interpretation of §94. It also cites a number of cases which allegedly sustain a permissive interpretation. It says great difficulty would be created if §94 were mandatorily applied, and authorities holding contrary are criticized. Finally it states that this is a matter wholly within state interest and thus insulated from federal control. When carefully analyzed, each of these bases is shown to be incorrect.

(1) 28 U.S.C. §1348 has no effect on 12 U.S.C. §94.

As one of the major bases for its decision, the Texas Supreme Court concluded that 28 U. S. C. §1348 affected 12 U. S. C. §94 in such a way as to require the venue directive in §94 to be permissively construed as to state courts. 28 U. S. C. §1348 reads as follows:

> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by

direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under Chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such Chapter.

"All national banking associations, shall, for the purposes of all other actions by or against them, be deemed citizens of the states in which they are respectively located."

Apparently the Texas Supreme Court read the last sentence in §1348 as making a Texas national bank, for purposes of actions by or against it, a "citizen" of Texas and thus subject to the procedural laws of that state as a "citizen" would be. This broad reading of this language is not justified by the words themselves, by the history of the statute, or by the cases interpreting the statute. The real purpose of the words in question was to make a national bank a "citizen" of the state in which it was located so it could resort to federal courts on grounds of diversity of citizenship, and to take away from national banks their previously existing right to utilize the federal courts solely because of a national bank's being a federal instrumentality. No broader meaning was intended.

§1348 has had a rather complex history. When the National Banking Act of 1863 was adopted, jurisdiction of suits by and against national banks was limited to federal courts. *National Banking Act of 1863*, §59, *12 Stat. 681*. When the National Banking Act of 1864 replaced the 1863 act, jurisdiction of such suits was given to state *and* federal courts. *National Banking Act of 1864*, §57, *13 Stat. 116-*

117. The 1864 Act used the language which later became 12 U. S. C. §94 (See discussion at p. 42, *infra*). When the federal statutes were revised in 1873, jurisdiction of such suits was again given only to federal courts. *Secs. 563(15), 629 (10), and 629(11), Rev. Stat. (1873).* In 1875, state courts were given jurisdiction of such suits again, apparently concurrently with jurisdiction in federal courts. *Act of February 18, 1875, Ch. 80, 18 Stat. 320.*

Under that state of the law national banks asserted the right to be sued in federal courts solely because they were federal instrumentalities. In 1882 Congress attempted to put a stop to this. The Act of July 12, 1882, Ch. 290, Sec. 4, 22 Stat. 163, read as follows:

> "Section 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to National Banking Associations, and it shall continue to be in all respects the identical association as it was before the extension of its period of succession; *provided, however, that the jurisdiction for suits hereinafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun;* and all laws and parts of laws in the United States inconsistent with this provision be, and the same are hereby, repealed." (Emphasis supplied.)

In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778 (1887)*, the United States Supreme Court construed this 1882 legislation as an attempt to keep national banks from using the federal courts solely on the basis of their being federal instrumentalities. That the intent of this statute was so unclear as to require a Supreme Court case for its interpretation, however, probably prompted a new effort to do the same thing in more explicit language. This new effort was *Sec. 4, Chapter 373, Act of March 3, 1887, 24 Stat. 554-555;* it was re-enacted as *Sec. 4, Chapter 866, Act of August 13, 1888, 25 Stat. 436.* It read as follows:

> "That all national banking associations established under the laws of the United States, shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The purpose of the 1882 and the 1888 acts together was discussed in *Continental National Bank v. Buford, 191 U.S. 119, 124-125 (1903):*

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon

> the ground that they were created by and exercised their powers under, Acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" (Emphasis supplied.)

In 1911, the portion reading "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state" was deleted. *Section 24, Act of March 3, 1911, 36 Stat. 1091-1093.* This clause had probably been inserted to clarify the previously discussed purpose. Unfortunately the clause was ambiguous; if read carefully it would actually *deprive* a national bank of access to federal courts on diversity grounds. This problem was discussed in *Petri v. Commercial National Bank of Chicago, 142 U. S. 644 (1892)*, and the Supreme Court indicated it would overlook the strict construction of this language in order to carry out the apparent intent of the statute. The existence of this ambiguity was probably the reason this language was deleted. The deleted language was not necessary to accomplish the purpose of the statute. After the 1911 deletion the 1888 statute eventually found its way into 28 U. S. C. Sec. 1348, and was enacted into positive law as it presently stands by Chapter 646, Act of June 25, 1948, 62 Stat. 993.

At the same time that Congress enacted the present 28 U. S. C. Section 1348 into positive law, it repealed the proviso in the 1882 Statute. *Section 39, Chapter 646, Act of June 25, 1948, 62 Stat. 992, 994.* The repealed portion is that which is *italicized* in the quotation from the statute on page 37, *supra.*

The United States Supreme Court has, in effect, construed the statutory provision which is now Section 1348 as one which only limits jurisdiction of national banks in federal courts. The Texas Supreme Court has erroneously construed it much more broadly; it would make national banks "citizens" of their states and thus subject to state procedural rules. This interpretation by the Texas Supreme Court would have the effect of treating national banks and state banks identically for the purpose of judicial proceedings. Yet the Texas Supreme Court used the *repeal* of the 1882 statute to reinforce its broad interpretation of Section 1348. The repealed portion of the 1882 statute, on its face, provides that state and national banks will be treated identically for purposes of jurisdiction. To repeal the 1882 statute certainly cannot be used to reinforce a contention that federal policy is to treat state and national banks identically. Instead it reinforces the opposite conclusion: that federal policy is to treat national banks differently from state banks.

Indeed, a 1924 Wisconsin case, *Brust v. Bank, 184 Wisc. 15, 198 N. W. 749*, used the *existence* of the 1882 Act to support a contention that the predecessor of 12 U. S. C. §94 was permissive as to state venue. Now the Texas Supreme Court uses the *repeal* of the same act to support the same proposition. The two cannot be consistent.

A number of other cases have held that §1348 (or its predecessors) has no effect on §94. They are: *Buffum v. Chase National Bank of New York, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952); International Refugee Organization v. Bank of America, 86 F. Supp. 884*

(S. D. N. Y. 1949); Rabinowitz v. Kaiser-Frazer Corp., 198 Misc. 312, 96 N. Y. S. 2d 638 (Sup. Ct. N. Y. 1950).

It is clear that the Texas Supreme Court erred in holding that 28 U. S. C. §1348 allowed Texas venue rules to apply in this case.

(2) Authority given to support the Texas Supreme Court's opinion is incorrect.

The Supreme Court of Texas cited several state cases in support of its decision. None of these state cases should override the federal authority cited in this brief. Even so, none of the cases cited presents a persuasive argument for interpreting §94 permissively. Three of the cases cited—*Cooke v. State National Bank, 50 Barb. 339 (Sup. Ct. N. Y. 1867), affirmed 52 N. Y. 96, 11 Am. Rep. 667 (1873); Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508 (1880);* and *Talmadge v. Third National Bank, 91 N. Y. 531 (1883)*—are old New York cases which have been overruled by *Raiola v. Los Angeles First National Trust & Savings Bank, 133 Misc. 630, 233 N. Y. S. 301 (City Ct. N. Y. 1929),* and cases following it. (See pp. 30-31 *supra.*) The effect of *Fresno Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157 (1890),* was discussed in *Monarch Wine Co. v. Butte, 249 P. 2d 291, 293-294 (Cal. App. 1952),* where it was decided that the Fresno case did not militate against a mandatory construction of §94. (See p. 32 *supra.*) Thus four of the twelve cases cited by the Texas Supreme Court have had doubt cast upon them by later authority in their own states. Another case cited by the Texas Supreme Court—*Levitan v. Houghton*

National Bank, 174 Mich. 566, 140 N. W. 1019 (1933)— relied on Chapter 290, Sec. 4, Act of July 12, 1882, 22 Stat. 162, to sustain its contention that the predecessor of §94 was permissive. The statute relied on was repealed in 1948. (See pp. 36-41 *supra*). *Guerra v. Lemburg, 22 S. W. 2d 336 (Tex. Civ. App. 1929, err. dis.)*, relied principally on the argument that §94 applied only to usury actions, a discredited theory that arose from a curious situation no longer existing.

The wording of the present Section 94 first appeared as Section 57 of the National Banking Act of 1864, 13 Stat. 116:

> "Section 57. That suits, actions, and proceedings, against any association under this act, may be had in the circuit, district or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases; provided, however, that all proceedings to enjoin the comptroller under the act shall be had in a circuit, district, or territorial court of the United States, held within the district in which the association is located."

When the federal statutes were revised in 1873, jurisdiction of all suits involving national banks was given only to federal courts. *Section 563 (15), Section 629 (10), and Section 629 (11), Rev. Stat. (1873).* In 1875, however, state courts were again given jurisdiction of suits against national banks, apparently concurrently with that of the federal courts. This was done in a somewhat circuitous way. By *Chapter 80, Act of February 18, 1875, 18 Stat. 320*, the wording of *Section 57* of the *National Banking Act of 1864*,

supra, (except for the proviso) was added to *Section 5198, Rev. Stat. (1873)*. This resulted in a curious juxtaposition, for Section 5198 had previously related only to actions to recover penalties for usury. When the federal statutes were codified in 1926, the usury portion of former Section 5198 was separated from the portion relating to jurisdiction and venue. The jurisdiction and venue portion became 12 U. S. C. §94. Except for elimination of the word "suits", 12 U. S. C. §94 contains the same wording as did §57 of the National Banking Act of 1864. During the time this wording was joined with the usury provision, however, there appeared some decisions such as *Guerra* holding that the jurisdiction-and-venue requirements now in §94 applied only to actions for penalties for usury. The codification of 1926 eliminated that argument. *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677.*

Cassatt v. Bank, 9 N. J. Misc. Rep. 222, 153 Atl. 877 (Sup. Ct. N. J. 1931), relies principally on the theory that the court in which the action was brought was a court of state-wide original jurisdiction and "in" every county in the state. Cf. *Chaffee v. Glens Falls National Bank & Trust Co., supra*, page 31. Whatever validity this theory may have in New Jersey or New York, it has no application to Texas. *Montpelier First National Bank v. Hubbard, 49 Vt. 1, 21 Am. Rep. 97 (1876)*, is not in point at all. That case concerned whether a national bank could sue in a state court as *plaintiff*, under the wording "Actions and proceedings *against* * * *" national banks found in a predecessor of 12 U. S. C.

§94. Venue was not involved. *Lee v. Citizens' Bank, 5 Ohio Dec. Rep. 21, 1 Am. Rep. 385, 2 Cin. Sup. Ct. Rep. 298, 13 Ohio Dec. Rep. 913 (1872)*, indicated that federal statutes required mandatory venue but was decided on the theory of waiver. There has been no waiver in the instant case. *Holmes v. National Bank, 18 S. C. 31, 44 Am. Rep. 558 (1882)*, held that on the basis of conflicting authority it could not withdraw state court jurisdiction from suits against national banks by "implication." We contend this is a statute clear on its face, and there is no real conflict of authority. *Continental National Bank v. Folsom, 78 Ga. 449, 3 S. E. 269 (1887)*, relied on *Casey v. Adams* and said that §94's predecessor applied only to usury. *Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194 (1924)*, followed *Cooke v. State National Bank, supra*, in holding that §94's predecessor was permissive. The *Cooke* case, of course, has been overruled. Thus it is seen that *none* of the state authority cited in the Texas opinion establishes a persuasive theory for holding 12 U. S. C. §94 permissive as to venue.

(3) Difficulty in applying 12 U.S.C. §94 is no reason to hold it inapplicable.

Another reason given by the Texas Supreme Court for its decision is that to apply 12 U. S. C. §94 mandatorily would lead to difficulties in suits involving national banks from several counties. (R. 371; *341 S. W. 2d 165.*) It cites *County of Okeechobee v. Florida National Bank, 112 Fla. 309, 150 So. 124 (1933)*. The *Okeechobee* case did not involve this problem, but was decided on the basis that the out-of-county national bank had waived its venue rights.

The statute was, however, construed as mandatory. If problems will arise if 12 U. S. C. §94 is given a mandatory interpretation, correction should be accomplished by Congress, not the courts.

(4) Other bases of the Texas Supreme Court's Opinion.

Another reason the Texas Supreme Court gave for its holding was that 12 U. S. C. §94 did not deprive the state courts of *jurisdiction* of an action of a national bank located and doing business in another state, or in a county or city other than that in which an action is brought. No one has contended that the state courts are without jurisdiction here; jurisdiction and venue are two different things. What this appellant does contend is that 12 U. S. C. §94 gives jurisdiction to the state courts and also sets out the venue rule they must follow. Since they did not follow that venue rule, the Texas decision should be reversed. The Texas court then admits that *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, "* * * definitely stated that the federal venue statute, * * * was mandatory rather than permissive." (R. 371-372; *341 S. W. 2d 165.)* It refuses, however, to follow the *Morgan* case because it says it is *dicta* and not binding on the Texas court. This appellant contends that the language in *Morgan* is not *dictum*, but if it is it is based on sound reason and sets out the policy which the United States Supreme Court has determined to follow. It is the *policy* of the United States Supreme Court that the state courts are bound to follow, and this policy should be followed where it is found. The *Morgan* decision should have been followed. It should be followed in this case. Again, the Texas Supreme Court contends that *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2 Cir.*

1936), cert. den. 298 U. S. 677, was intended to apply only to actions against national banks in *federal* courts. *Leonardi* indicated that 12 U. S. C. §94 is mandatory and there is nothing in the language of the opinion to indicate that the mandatory interpretation was not intended to apply to the whole statute.

Finally, the Texas Supreme Court held, without any supporting authority, that this suit is a matter "wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes." (R. 369, *341 S. W. 2d 164.)* We submit that under the authorities hereinabove discussed this conclusion is self-evidently incorrect.

CONCLUSION

For the reasons stated, the appellant respectively submits that the judgment of the Supreme Court of Texas should be reversed, that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas reversing the decision of the trial court should be affirmed, and that venue in this case as to the national banks in question should be transferred to Dallas County.

Respectfully submitted,

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PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of November, 1961, I served copies of the foregoing brief of appellant on appellee by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

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None of the persons on whom service is to be made resides five hundred miles or more from me.

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No. 14

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF FOR THE APPELLANT

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No. 90

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas (R. 365-374) is reported at 341 S. W. 2d 161.* The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 351-363) is reported at 331 S. W. 2d 349 (Tex. Civ. App., 1960), there being no official reports for Texas Courts of Civil Appeals.

*Not yet officially reported.

JURISDICTION

On November 23, 1960 the Texas Supreme Court entered the judgment appealed from (R. 364-365); and on December 21, 1960 it overruled appellant's motion for rehearing (R. 374-375). On March 16, 1961 appellant filed its notice of appeal to this Court (R. 375-376). On October 9, 1961 this Court entered its order in this case and in No. 91, Republic National Bank of Dallas v. C. H. Langdeau, Receiver, consolidating the two cases and postponing the question of jurisdiction to the hearing on the merits (R. 381). The jurisdiction of this Court rests on 28 U.S.C. §1257(2). Appellant's authorities and argument in support of this Court's jurisdiction appear under Part I of the Argument, pp. 11-26 below.

STATUTES INVOLVED

FEDERAL STATUTES

1. 12 U. S. C. §94 (1940 ed) (REV. STAT. §5198; 18 STAT. 320; 36 STAT. 1167):

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. PERTINENT STATUTES AT LARGE

(i) 12 STAT. 681 (1863)*:

> "[S]uits, actions, and proceedings by and against any association under this act may be

*Act of February 25, 1863, §59. The 1863 act, the first legislation regarding national banks, was repealed and superseded by The National Bank Act, Act of June 3, 1864, *infra*.

had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

(ii) THE NATIONAL BANK ACT, §57, 13 STAT. 116 (1864):

"[S]uits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however,* That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

(iii) REV. STAT. §5198 (1875), 18 STAT. 320:

"[S]uits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATE STATUTES

Article 21.28 of the INSURANCE CODE of Texas, as amended (Acts 1955, 54th Leg., pp. 737, 742, ch. 267), [captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers"], Section 4(f):

"Sec. 4. Actions.

"• • •

"(f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceed-

ings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

QUESTIONS PRESENTED

This civil action was brought in a state court in Travis County, Texas by the statutory liquidator-receiver of an insurance company against appellant, a national banking association located in Dallas County, Texas. Appellant asserted that under the provision of The National Bank Act contained in 12 U. S. C. §94 it was entitled to be sued in Dallas County, Texas. The Texas Supreme Court held that the federal statute was not intended to control venue in a civil action against a national banking association in the state court. The questions presented are:

1. Whether the judgment of the Texas Supreme Court in this case is such a final judgment as may be reviewed by this Court under 28 U. S. C. §1257 (2).

2. Whether the provision of The National Bank Act contained in 12 U. S. C. §94 governs venue of an action against a national banking association in a state court.

3. Whether, as suggested by the Texas Supreme Court, the provision contained in 12 U. S. C. §94 is "permissive" only rather than mandatory.

4. Whether the Texas statute relating to venue of actions by the statutory liquidator-receiver of insurance companies [Article 21.28 §4(f) of the Insurance Code of Texas], rather than the provision of 12 U. S. C. §94, governs actions

in state courts in Texas against national banking associations

STATEMENT

The Insurance Company of Texas (which name was later changed to ICT Insurance Company) was organized in May of 1950 under the insurance laws of Texas (R. 25). On February 20, 1957 the State of Texas commenced in the 98th District Court of Travis County, Texas a delinquency proceeding against ICT Insurance Company (herein called "ICT") (R. 346). In due time the 98th District Court of Travis County, Texas appointed a permanent receiver of ICT (R. 346). Shortly prior to July 21, 1958 the Board of Insurance Commissioners of the State of Texas duly designated C. H. Langdeau, appellee herein, as Liquidator. Under Article 21.28 of the Texas Insurance Code the Liquidator is the person designated by the Texas Board of Insurance Commissioners to be receiver, liquidator, rehabilitator, or conservator of insurers. On July 21, 1958 the 98th District Court of Travis County, Texas duly appointed appellee as receiver of ICT; and he promptly qualified as such receiver (R. 346-347).

After Appellee was appointed and qualified as receiver of ICT as such receiver he filed this plenary action in the 98th District Court of Travis County, Texas (R. 1). Appellee's pleading in this action names appellant and 143 other parties as defendants (R. 2-12). Such pleading is quite long (R. 1-321) and difficult to summarize briefly. Broadly stated, appellee charges that appellant and the other defendants entered

into a conspiracy to defraud ICT and the public, which conspiracy "began in May 1950 and continued until February 20, 1957, the date of receivership" (R. 20-23). Based on the alleged "consiparcy to defraud" appellee claims that the appellant and the other defendants are liable "jointly and severally, in the sum of $15,000,000.00 with legal interest from May 24, 1950" (R. 316-317). Based on certain alleged wrongful acts by appellant at various times from June 6, 1950 through April 4, 1952 appellee seeks separate recovery from appellant of various sums totalling in excess of $600,000.00 plus interest from the dates of the alleged wrongs (R. 318). Appellee also seeks separate recovery for alleged wrongful acts of other defendants and groups of defendants occurring at various times (R. 317-321).

Pursuant to Rule 86 of the Texas Rules of Civil Procedure appellant duly filed its pleading designated as a plea of privilege (R. 322-324), claiming that by the express provisions of the federal law applicable to national banking associations the action against it could be had only in a court in Dallas County, Texas (R. 323-324). Republic National Bank of Dallas, appellant in No. 91, duly filed a similar plea of privilege (R. 325-326). Appellee then duly filed his sworn pleading controverting the two pleas of privilege (R. 337-343). Both pleas of privilege were heard by the trial court pursuant to Rule 87 of the Texas Rules of Civil Procedure, and both were overruled (R. 343-344; 344-345).

From the order of the trial court overruling its plea of privilege appellant duly appealed to the Court of Civil Ap-

peals for the Third Supreme Judicial District of Texas at Austin. Republic National Bank of Dallas similarly appealed. In connection with such appeals appellant, appellee, and Republic National Bank of Dallas duly executed and filed an agreement as to certain material facts (R. 345-348), including (1) the material facts as to the ICT receivership and appellee's qualification as receiver; and (2) that as of February 20, 1957 and all times thereafter each of the banks was a national banking association with "each having its principal and only place of business in the City of Dallas, Dallas County, Texas." In such agreement it was further stipulated that "the only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said Plaintiff's action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action was controlling" (R. 347-348).

On December 9, 1959 the Court of Civil Appeals delivered its single opinion in both appealed cases (R. 351-363), and it entered judgments reversing the trial court and remanding each of the cases with instructions to render judgment sustaining each of the pleas of privilege and to transfer the cause as to the appellants involved "to any Civil District Court of Dallas County in accordance with the provisions of Rule 89" of the Texas Rules of Civil Procedure (R. 349-350). This opinion of the Court of Civil Appeals was grounded primarily on the conclusion that the federal stat-

ute (12 U. S. C. §94) was plain (R. 362) and that the decisions of the United States Supreme Court "fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94" (R. 358).

Appellee duly applied to the Texas Supreme Court to grant writ of error to review the judgments of said Court of Civil Appeals, which application was granted. In the Texas Supreme Court the two cases were consolidated and heard together. On November 23, 1960 the Texas Supreme Court delivered its opinion in both cases reversing the judgments of the Court of Civil Appeals and affirming the judgments of the trial court (R. 365-374). On the same date the Texas Supreme Court entered judgments in accordance with such opinion (R. 363-365). The Texas Supreme Court, agreeing that the cases presented "but a single question of law" (R. 365), reversed primarily on the ground that "It was not the intention of the Congress in adopting 12 U. S. C., Section 94 * * * that it was to control with respect to an action against a national bank commenced in a state court" and that "This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes" (R. 369). The Texas Supreme Court rejected the statements of this Court in *First National Bank of Charlotte v. Morgan*, 132 U. S. 141 (1889), as dicta and therefore not binding on the Texas Supreme Court (R. 371-372).

SUMMARY OF ARGUMENT

QUESTION ONE—JURISDICTION OF THE COURT

The only issue on the record concerns whether the Texas judgment appealed from is to be deemed a final judgment under 28 U. S. C. § 1257.

Texas law provides for a separate hearing, trial, and decision on any venue issue before trial on the merits. No revision of that decision is permissible by the trial court after the term. Texas law permits appeal, and requires prompt appeal to avoid waiver of a venue challenge. As a matter of Texas law, the judgment (of whatever court) ultimately resolving a venue issue is conclusive and final. Texas procedure and Texas law thus clothe the judgment appealed from with an actual finality for all future Texas purposes.

"Final judgments or decrees" as used in 28 U. S. C. § 1257 and "final decisions" as used in 28 U. S. C. §§ 1291 and 1293 mean the same thing. This Court's practical construction in *Cohen v. Beneficial Industrial Loan Corp.* of what is final for purposes of review can and should be applied in this case.

Measured by the standards of finality in the *Cohen* case, this Court has jurisdiction because:

(1) The judgment appealed from was a formal judgment which concludes and closes the venue issue conclusively and finally in Texas.

(2) The venue issue which was concluded and disposed of below in the separate venue hearing and ap-

peal was separable from and collateral to the merits of the case. No step of any kind was thereby taken toward final disposition of the merits. The judgment below will not be merged in any final judgment on the merits.

(3) If review by this Court is delayed until after trial in Travis County, Texas, it will be too late effectively to remedy the denial of appellant's right to trial in Dallas County, Texas. By that time appellant's claimed federal right will have been lost.

(4) There has been a complete denial of an important federal right granted by Congress to national banks. This appeal does not involve merely an erroneous application of a right recognized by the courts below.

Texas has fully adjudicated rights, and such adjudication is not subject to further review there. A state statute has been sustained, and the conflicting federal statute rejected. The case can never be more mature for review than it is now.

QUESTIONS TWO, THREE, AND FOUR—CONSTRUCTION OF THE FEDERAL STATUTE INVOLVED.

Allowance or denial of a national bank's privilege of venue is a matter of federal law, and not state law.

National banks are Congressionally-created, and may not be interfered with by state legislative or judicial action except so far as Congress may permit.

This Court has plainly decided that the venue right asserted herein must be recognized by state courts. *First National Bank v. Morgan.*

Subsequent decisions of this court have recognized the continuing efficacy of the *Morgan* decision. None authorizes the decision of the Texas Supreme Court below.

State court decisions are flatly conflicting. Those holding the federal statute "permissive" only render the statute meaningless.

The federal decisions, holding application of the statute obligatory, necessarily imply a corollary that any contrary state statute, rule, or policy must fall.

There is no indication that Congress intended 12 U. S. C. §94 not to apply to state court actions. The evidence is to the contrary.

The legislative history of, and decisions under, related statutes concerning suits against national banks show that such statutes have in no way impeded the full force of 12 U. S. C. §94.

ARGUMENT

I

THIS COURT'S JURISDICTION IN THE PRESENT CASE

A. The Issue as to Jurisdiction

This Court's October 9, 1961 order stated that further consideration of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 381). Accordingly, at the outset appellant will address itself to the question of whether or not this Court has jurisdiction to consider this appeal.

28 U. S. C. §1257 (2), which provides for this Court's jurisdiction over appeals from judgments of state courts, reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "* * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In this case from the outset there was drawn in question the clash between the federal statute governing national banks and a state statute. The Texas Supreme Court, the highest court in Texas in civil cases, held that the state statute rather than the federal statute controls.

In the trial court appellant claimed that under 12 U. S. C. §94 appellant had the right to insist on being sued in a court in Dallas County, Texas (R. 323-324). In opposition to this claim appellee contended that a state statute on venue [Section 4(f) of Article 21.28 of the Texas Insurance Code] controlled rather than the federal statute. The basic facts pertinent to this legal issue were undisputed. The trial court held the state statute to be valid and controlling. On the appeal by appellant to the Court of Civil Appeals, the intermediate court of appeals in Texas, the parties stipulated and agreed that "the only issue involved" was whether the federal statute or the state statute controlled with respect to the right claimed by appellant and denied by the trial court (R.

347-348). The Court of Civil Appeals held that the federal statute controlled and that appellant did have the federal right that it asserts. The Texas Supreme Court held that appellant did not have the right that it had claimed under the federal statute, saying the matter is one "where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes" (R. 369). The Texas Supreme Court thus decided the conflict in favor of the state statute, and it overruled without opinion appellant's motion for rehearing.

The record in this case plainly shows that the only question concerning this Court's jurisdiction is one involving the interpretation of the phrase "final judgments or decrees" as that phrase is used in the opening words of 28 U. S. C. §1257.

B. The Judgment of the Texas Supreme Court in This Case is Such a Final Judgment as May Be Reviewed by This Court.

Since this case concerns a Texas judgment overruling a plea of privilege, we deem it material to refer briefly to the Texas procedure upon such pleas and the Texas law as to the incidents and effects of the judgment thereon. Texas procedure in civil actions provides for the conclusive disposition of venue issues before the trial on the merits. Rule 86 of the Texas Rules of Civil Procedure* requires that a challenge to venue be by a verified plea of privilege. Such verified plea of privilege was duly filed by appellant in the present case.

*Set forth in full, Appendix A.

If the party bringing the action desires to oppose such plea of privilege, he must file a verified controverting plea. In the present case appellee filed such a controverting plea (R. 337-343). Rule 87 of the Texas Rules of Civil Procedure* provides for a separate hearing and trial, by jury if demanded, on the venue issue joined by the filing of the controverting plea. In the present case the trial court, without the intervention of a jury, held such a separate hearing and trial (R. 343-345). It was stipulated that appellee was the duly appointed and qualified receiver of ICT appointed by the trial court in which the action was being brought and that appellant was a national banking association with its principal and only place of business in Dallas County, Texas. Accordingly, as to venue the sole question was the legal question of whether the federal statute relied on by appellant or the state statute relied on by appellee was controlling. In Texas there is no procedure for carrying venue issues forward for hearing and determination with the trial on the merits. The trial court held that appellant did not have the right that it claimed to have under the federal statute.

Texas procedure provides for appellate review of trial court judgments sustaining or overruling pleas of privilege. Article 2008, Revised Civil Statutes of Texas. Not only is such separate appeal available in Texas, under the Texas decisions the complaining party must appeal promptly or he will waive his right to complain. By Texas decisions the ruling on a plea of privilege is treated as final insofar as it disposes of the issue as to the venue of the case. In *Wichita*

*Set forth in full, Appendix A.

Falls & S. R. Co. v. McDonald, 141 Tex. 555, 174 S. W. 2d 951, 952-953 (1943), the Texas Supreme Court held:

> "However, it appears to be well settled under the rules and decisions of this State that a ruling on a plea of privilege is treated as final in so far as it disposes of the issue as to the venue of the case. In this connection it will be noted that the rules provide for a separate hearing on the issues raised by the plea of privilege and controverting affidavit. Rule 87. They further provide that an appeal from the order or judgment of the court thereon may be prosecuted by either party. The appeal must be perfected within twenty days after the rendition of the order appealed from. In the event the plea of privilege is sustained and the case ordered transferred to another county, such appeal suspends the enforcement of the order. Rule 385. A failure to appeal from the order entered on the plea of privilege at the term of court at which such order was made and entered is a waiver of any right to thereafter complain of the same. Smith Bros. Grain Co. v. Windsor & Stanley, Tex. Com. App., 255 S. W. 158. Such an order from which no appeal has been prosecuted has a sufficient element of finality to support a plea of res judicata. Old v. Clark, Tex. Civ. App., 271 S. W. 183; Hewitt v. DeLeon, Tex. Civ. App., 5 S. W. 2d 236; Scott v. Clark, Tex. Civ. App., 38 S. W. 2d 382, par. 6; Roach v. Trinity Universal Ins. Co., Tex. Civ. App., 119 S. W. 2d 127; See also First National Bank v. Hannay, 123 Tex. 203, 67 S. W. 2d 215. It has also been held that an order overruling a plea of privilege entered at one term is not subject to review by motion to reconsider filed at a subsequent term. United Brothers of Friendship of Texas v. Wilson, Tex. Civ. App., 53 S. W. 2d 95; Pass v. Ray, Tex. Civ. App., 44 S. W. 2d 470."

In any further Texas proceedings the determination by the Texas Supreme Court on the venue issue will be considered binding also on general principles of the law of the case.

Norwood v. Cobb, 20 Tex. 588 (1857); *Connecticut General Life Ins. Co. v. Bryson*, 148 Tex. 86, 219 S. W. 2d 799 (1949); *Commonwealth Nat. Bank v. Goldstein*, 261 S. W. 538 (Tex. Civ. App. 1924, error dism'd).

The following are thus fundamentals under Texas law: (1) the hearing on the plea of privilege is a separate trial to be held prior to any trial on the merits; (2) a party who is dissatisfied with a judgment on a plea of privilege must appeal promptly to avoid waiving its right to thereafter complain of the judgment; (3) the judgment or ruling on a plea of privilege is treated as final insofar as it disposes of the issue as to the venue of the case, the sole issue involved in the venue trial; and (4) in the case at bar there can be no later state court judgment that passes on or disposes of the federal right claimed by appellant in this case. It is in this context that the interpretation of the phrase "final judgments or decrees" in 28 U. S. C. §1257 is presented in this case.

The words "final judgments or decrees", as used in 28 U. S. C. §1257, are found with slight differences in verbiage in various present and past statutes relating to federal appellate jurisdiction. 28 U. S. C. §1291 and 28 U. S. C. §1293 relating to appeals to federal courts of appeal from federal district courts and from courts of Puerto Rico, use the words "final decisions." In Section 25 of the first Judiciary Act of 1789 (1 Stat. 85), the forerunner of 28 U. S. C. §1257, Congress used the phrase "a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had." In Section 21 of the First Judiciary Act of 1789 (1 Stat. 83) Congress used

the phrase "final decrees in a district court in causes of admirably and maritime jurisdiction." In Section 22 of the same act, the forerunner of 28 U. S. C. §1291, Congress used the phrase "final decrees and judgments in civil actions in a district court." There does not appear to be any historical basis for these slight variations in wording. See Warren, *History of the Federal Judiciary Act of 1789*, 37 HARVARD LAW REVIEW 49, 104-105 (1924); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE LAW JOURNAL 537, 549 (1932).

Many decisions under the various federal appellate jurisdiction statutes have discussed the reasons or purposes of requiring finality of lower court judgments or decrees as a condition to appellate review. The primary reasons frequently stated are to disallow appeals from decisions which are tentative, informal or incomplete and to avoid piecemeal and fragmentary review. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120 (1945). Viewed from the standpoint of reason or purpose as well as from the standpoint of legislative history, the phrases used in present sections 1257, 1291, and 1293 are identical in meaning. In *Matter of Tiffany*, 252 U. S. 32, 36 (1920), the two phrases as used in earlier statutes relating to jurisdiction were said to "mean the same thing." See, also, *Buscaglia v. District Court of San Juan*, 145 F. 2d 274, 280-1 (1st Cir. 1944), *cert. den.* 323 U. S. 793 (1945).

Given such final determination, review of cases originating in federal courts and of cases originating in state courts

differs only as to types of subject matter which may be involved. Under 28 U. S. C. §1291 and 28 U. S. C. §1293 ultimate federal review, in courts of appeals at least, is assured as to all issues in the cases. On the other hand, under 28 U. S. C. 1257 federal judicial review is available only in those limited cases where the issue involves interpretation of a treaty or statute of the United States or conflicts between state statutes and the federal constitution, treaties or laws. It is apparent that 28 U. S. C. §1257 already contains quite narrow restrictions upon review based on the nature of the issue. The decisions interepreting sections 1257, 1291 and 1293 suggest no basis for any narrower or different standard for determining reviewability of state court and federal court cases insofar as the element of finality is concerned.

A leading case in this Court involving the meaning of "final" is *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). In that case the plaintiffs had brought a stockholders' derivative action in the United States District Court against the Delaware corporate defendant and certain of its managers and directors, trial court jurisdiction being based on diversity of citizenship. On the basis of a New Jersey statute adopted while the action was pending the corporate defendant moved to require the plaintiffs to furnish security for expenses. The trial court denied the motion on the ground that the state enactment was not applicable to such an action pending in a federal court. The Court of Appeals was of a contrary opinion and reversed. This Court granted certiorari and affirmed. All of the justices of this Court were in agreement as to the reviewability of the deci-

sion under 28 U. S. C. §1291, though there were differences among the members of the Court as to the merits. Because of the pointed applicability to the present case of the portion of the opinion in the *Cohen* case dealing with jurisdiction to review the trial court's decision (337 U. S. at 545-547), we set forth that part of the opinion in full in Appendix B.

In the *Cohen* case the trial court's decision was described as one that falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546. Examination of the elements, negative and affirmative, governing review as discussed in the *Cohen* case shows that the judgment appealed from here is a final judgment which may be reviewed by this Court.

(1) Terminative Effect.

In the *Cohen* case this Court said (337 U. S. at 546):

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."

From the record in the present case it is obvious that the judgment of the trial court was formal and not tentative, informal or incomplete. Under Texas law and practice it was conclusive and final as to the venue right. By the Texas stat-

ute creating the 98th District Court of Travis County, Texas that state court has a term of court lasting two months. Art. 199, Revised Civil Statutes of Texas. After the end of the term of court in which the order overruling the plea privilege was entered the trial court had no power to reconsider or change its order on the plea of privilege. If appellant desired to keep from waiving the right granted to it by federal statute, it had to appeal; and the ultimate decision on that appeal is determinative and final on the venue right. In the *Cohen* case there was the possibility of a later appeal at a time when it would have been "too late effectively" to review the trial court's decision. In this case, under Texas practice delay in appeal by the complaining party would have resulted in waiver of the right to complain.

Conceding that the state law on finality is not controlling insofar as the ultimate question before this Court is concerned, nevertheless the state law as to the nature and effect of the judgment in its local context is significant to the jurisdictional question before this court, in that it clothes the decision presented for review with actual finality. The decision below, as far as Texas is concerned, is actually complete, actually closed, actually finished, actually conclusive. This finality-in-fact does bear heavily on the tests of reviewability under *Cohen v. Beneficial Industrial Loan Corp.*—including the particular factor under consideration as well as others discussed later herein.

In *Montgomery B. & C. T. C. v. Ledbetter Erec. Co.*, 344 U. S. 178 (1952), relied on by appellee in his motion to dismiss the appeal, the Alabama trial court's temporary writ of injunction was provisional and temporary because the trial

court had continuing jurisdiction to dissolve or modify the temporary injunction at any time and was required to reconsider the same matters again on the permanent injunction hearing which was yet to be held in the trial court. Here the trial court in Texas did not have and does not have any such continuing jurisdiction and or authority to reconsider or set aside its final judgment as to venue. Equally inapplicable here and for the same reasons are the other authorities relied on by appellee, *Market Street Railway Co. v. Railroad Commission*, 324 U. S. 548 (1945), and *Arnold v. United States*, 263 U. S. 427 (1923).

In the present case the state court has "fully adjudicated rights" and such "adjudication is not subject to further review by a state court." This is the test of finality as announced by this Court in *Gospel Army v. City of Los Angeles*, 331 U. S. 543 (1947). The judgment in the present case fully satisfies the requirement that it be one that concluded and closed the matter. Unless this Court reviews now the judgment of the Texas Supreme Court in the present case, the right provided for in 12 U. S. C. §94 will be lost as effectively as if such right had never existed.

(2) Separability and Collateral Nature of the Claimed Right.

In the *Cohen* case this Court stated another requirement for reviewability as follows (337 U. S. 546):

> "Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the

> proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment."

In the case at bar the judgment appealed from fully meets this standard. In the separate trial on the plea of privilege the trial court considered only the matter of whether or not appellant was entitled to be sued in a court in Dallas County, Texas. There was no disputed fact relating to the venue issue. It was stipulated that appellee was the receiver referred to in the state statute and that appellant was a national bank with its principal and only place of business in Dallas County, Texas. The trial court's determination did not make any step toward final disposition of the merits of the case. In its opinion in the present case the Texas Supreme Court clearly stated (R. 367):

> "In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed."

Upon final disposition of appellee's action on its merits the judgment would not even make reference to the final judgment made long before at the conclusion of the venue hearing relating to the proper venue of the suit.

Of the 144 defendants named in the appellee's action in the present case only appellant and Republic National Bank of Dallas are national banks entitled to claim rights under 12 U. S. C. §94. This court has long recognized the reviewability of adjudications which are final in nature, concern matters distinct from the general subject of the litigation,

and affect only the parties to the particular controversy as to which review is sought. Such adjudications may be reviewed without awaiting the determination of the general litigation or the rights of other parties who are before the lower court but who are completely disinterested in the matter presented for review. *United States v. River Rouge Imp. Co.*, 269 U. S. 411 (1926); *Brady v. Work*, 263 U. S. 435 (1924); *Williams v. Morgan*, 111 U. S. 684 (1884).

(3) Time for Effective Review.

In the *Cohen* case this Court emphasized the benefits of review at a time when review could be effective in the following statement (337 U. S. at 546):

> "When that time [final judgment on the merits] comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

These observations grounded on practicality and fairness are particularly appropriate in the present case. The federal right asserted by appellant is the right to require that appellee's action against it be tried in Dallas County, Texas, rather than in Travis County, Texas. It would be highly unjust, as well as wasteful and unnecessary, to require that appellant stand trial with 143 other defendants in a distant court contrary to the federal statutory provision, if applicable, thereby losing the benefit of its claimed federal right in order to arrive ultimately at a point where it can get from the Texas courts to this Court for a determination of

whether or not such "lost right" had existed. The issue cannot conceivably be more mature or ripe at a later stage, and deferral of review will work irreparable injury to appellant with no compensating benefit to the orderly and efficient administration of justice. As stated by the Court in a related context in *Cobbledick v. United States*, 309 U. S. 323, 328-329 (1940), interepreting the earlier case of *Perlman v. United States*, 247 U. S. 7 (1918):

> "To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes."

Appellee's pleading does not suggest that his state court action will involve any further federal question as to appellant, and we know of none ourselves. That this case may never again be presented to this Court for review on that account, or that appellant might (as appellee has suggested) not complain at a later stage if appellant prevails in or after a Travis County trial, does not negative the fundamental fact that by that time appellant would have lost its valuable federal right. Unless this Court reviews and corrects the decision below at this stage, such right will be forever lost.

If appellee's contention in this respect is sustained, then the ruling of the court below on appellant's venue right under 12 U. S. C. §94 in the state court action will in fact be "in-

sulated from federal judicial review," just as the Texas Supreme Court said.

In the *Cohen* case this Court pointed out that it had long given the jurisdictional statute a "practical rather than a technical construction." The present case clearly calls for such a practical construction of the statute. *Swift & Co. v. Compania Colombiana*, 339 U. S. 684, 689 (1950).

(4) Denial of an Important Federal Right.

In the *Cohen* case this Court concluded its remarks on reviewability of the lower court's judgment as follows (337 U. S. at 546-547):

> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

In the present case as in the *Cohen* case there has been a categorical denial of a federal right. In the *Cohen* case the right was conferred by a New Jersey statute, and there might have been some basis for doubt as to whether the right was available in the federal court in New Jersey. There the right was important because it provided a way to save the defendant from substantial expense. Here the right was

granted by clear federal statute which has been a part of the federal law since the enactment of The National Bank Act of 1864. The right is an important right in that it protects the national bank from expense, inconvenience, and the possibility of local prejudice or bias. In any event, it is an important federal right because Congress granted it, and if it is to be denied Congress alone should make this determination. On other occasions this Court has recognized the material distinction between reviewing the question of whether an important federal right had been denied and reviewing a question involving the application of a recognized right. *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8 (1931).

We emphasize that this Court's review now of the judgment entered below does not call for any general exception to or variance from previously recognized principles governing reviewability in this Court. The assumption of appellate jurisdiction here will not tend to enlarge or generally expand this Court's jurisdiction. The narrow facts here involved present a correspondingly narrow question as to this Court's jurisdiction to review the judgment from which appeal has been taken. In the *Cohen* case this Court described the decision there reviewed as being within "that small class." We sincerely urge that the present case comes within the same "small class" referred to in the *Cohen* case. The complete and unqualified denial of appellant's federal right in this case justifies and calls for present appellate review by this Court.

II

THE PROVISION OF THE FEDERAL STATUTE CONTAINED IN 12 U. S. C. §94 GOVERNS VENUE OF AN ACTION AGAINST A NATIONAL BANKING ASSOCIATION. THE PROVISION IN SUCH FEDERAL STATUTE IS MANDATORY. THE STATE STATUTE CAN NOT GOVERN THIS STATE COURT ACTION AS AGAINST NATIONAL BANKING ASSOCIATIONS.

In *Van Reed v. People's National Bank*, 198 U. S. 554, 557 (1905) this Court said:

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interferred with by state legislative or judicial action, except so far as the law-making power of the government may permit."

In its opinion in the present case the Texas Supreme Court cited the *Van Reed* case and recognized its principle in the following language (R. 369):

> "If, under federal decisions, United States Revised Statute No. 5198, 12 U. S. C., Sec. 94, is applicable here, then all state statutes in conflict therewith must yield."

Again, the Texas Supreme Court stated (R. 373):

> "Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its con-

stitutional or statutory rights, nor can a federal right be defeated under the name of state practice."

We submit that while these principles were recognized, they were not applied, in the decision of the Texas Supreme Court. For it has given effect to state legislative and judicial action which interferes with the right granted to national banks by the federal statute contained in 12 U. S. C. §94.

A. Federal Statutory Background.

Preliminary to a discussion of the statute and authorities applying it, a brief resume of the history of the legislation will be helpful. The first federal statute which provided for the formation of national banking associations was the Act of February 25, 1863, 12 Stat. 665-682 (1863). Section 59 of that 1863 act provided "that suits, actions, and proceedings by and against any association under this act may be had in any circuit, district or territorial court of the United States within the district in which such association may be established." 12 Stat. 681 (1863).

The 1863 act was very shortly superseded by the Act of June 3, 1864, 13 Stat. 99-118 (1864), known as The National Bank Act, 18 Stat. 123 (1874), 12 U. S. C. §38 (1940 ed.). Section 57 of the 1864 act provided "that suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said associ-

ation is located having jurisdiction in similar cases." 13 Stat. 116-117 (1864). Where the 1863 act had referred to suits by *and* against national banking associations, the 1864 act referred only to actions against national banking association. Where the 1863 act had provided only for actions in federal courts in the district in which the banking association may be established, the 1864 act provided for actions in the federal court in the district in which the national banking association may be established or in a state, county or municipal court in the county or city in which the national banking association is located.

In the Revised Statutes of 1873, the revisers omitted Section 57 of the Act of June 3, 1864. It is doubtful that this omission had the effect of repealing Section 57 of The National Bank Act. This Court's opinion in *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416, 428 (1916), indicates that Section 57 of The National Bank Act had been the law continuously since 1864. In any event, Congress soon reenacted the provision in the Revised Statutes of 1875, as follows (Act of February 18, 1875, 18 Stat. 316, 320):

> "Section five thousand one hundred and ninety-eight is amended by adding thereto the following: 'That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases'."

No change of any kind in the pertinent statute has been made from February 18, 1875 to the present. In Section 291 of The Judicial Code of 1911, Congress transferred all the powers of the circuit courts to the district courts. 36 Stat. 1167. Based on this, in 12 U. S. C. §94 (1940 edition) the codifiers eliminated the reference to circuit courts.

B. Decisions in the Federal Courts.

The allowance or denial of a national bank's privilege of venue under the foregoing statutory provisions is a matter of federal law, and not state law. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 52-3 (1941). Accordingly, we turn to an examination of the federal court decisions under those statutes. Such decisions uniformly fail of lending support to the decision of the Texas Supreme Court herein.

The decision of most pointed applicability to the case at bar on the effect to be given the federal statute in state courts is *First National Bank v. Morgan*, 132 U. S. 141 (1889). In it a national bank located at Charlotte in Mecklenburg County, North Carolina was sued in the Superior Court of Cleveland County, North Carolina. The bank defended upon the merits. When it was unsuccessful on the merits it appealed to the Supreme Court of North Carolina, and in that appellate court for the first time claimed the right granted to it under R. S. §5198. The state court affirmed. This Court affirmed because the defendant had waived its venue right in failing to assert its right promptly. But this Court's decision was plain and compelling in its holding that the federal venue

right must be recognized by state courts. The Court stated (132 U. S. at 145):

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. *First Nat. Bank of Bethel v. Pahquioque Nat. Bank*, 81 U. S. 14 Wall. 383, 394; *Crocker v. Marine Nat. Bank*, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

The Texas Supreme Court justified its disregard of the *Morgan* case with the explanation that "the statement was dicta, and is, therefore, not binding on this court" (R. 372). To the contrary, as a matter of stare decisis we stand on this Court's plain view of the statute expressed in the *Morgan* opinion. It forcefully reflects the absence in 12 U. S. C. §94, as stated by the Court of Civil Appeals below (R. 362), of any "tenable ground upon which to construe a plain statute contrary to its express wording." It is consistent with decisions which preceded it, and has been recognized as correct, expressly or impliedly, by the subsequent decisions on the subject.

Three federal decisions preceded the *Morgan* decision. The first of these was *Cadle v. Tracy*, 4 Fed. Cas. 967, No. 2279 (C. C. S. D. N. Y. 1873), construing §57 of The National Bank Act. In the *Cadle* case a resident of Kentucky had sued a national bank located in Alabama in the Supreme Court of New York. The receiver of the national bank sued in the federal circuit court to enjoin proceedings in the state court. At page 972 the court stated:

> "Moreover, congress having provided for the creation of these associations, and having power to say where they may be sued, when, taking the 8th and 57th sections of the act together, we find that congress has prescribed that they may be sued in certain designated courts, it is a proper construction of the language, to hold, that they must be sued in these courts, and cannot be sued in any others."

The application of §57 in the *Cadle* case, though in a somewhat different context from the *Morgan* case and the case at bar, clearly views the application of the statute as manda-

tory. There is no basis in reason for holding the statute mandatory as between conflicting jurisdictions of different states, and conflicting jurisdictions of different counties within a single state.

The *Morgan* decision was foreshadowed by this Court's opinion in *Bank of Bethel v. Pahquioque Bank*, 81 U. S. (14 Wall.) 383 (1872), where this Court was reviewing a decision of the Supreme Court of Errors of the State of Connecticut. The defendant bank had contended that the state court had no jurisdiction over the national bank. Rejecting this contention, the Court at the outset assumed the applicability of the federal provision as to state venue (81 U. S. at 402):

> "Commenced as the action was in the proper court of the state where the Association is located and in a court having jurisdiction in similar cases, which is not denied, it is quite clear that the objection to the jurisdiction of the court founded upon the chraracter of the association as an instrument of the National Government, must be overruled. Jurisdiction in such suits is, unquestionably, vested in any circuit, district or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the Act of Congress gives authority to creditors to prosecute such controversies in 'any state, county or municipal court in which said association is located' in all cases where it appears that such courts have jurisdiction under the state laws in similar controversies. * * * Authorities to support the proposition are not necessary, as it rests upon an express provision in the Act of Congress. 13 Stat. at L. 116."

The next pre-*Morgan* case to come before this Court was *Casey v. Adams*, 102 U. S. (12 Otto) 66 (1880), decided under Rev. Stat. §5198, the successor to Section 57 of The National Bank Act. Adams & Co. sued in a state court in Lafourche Parish, Louisiana, to foreclose a mortgage, and after foreclosure the court ordered the national bank which claimed under a prior mortgage to show cause why its mortgage should not be eliminated in distribution of the fund in custody of the court. The national bank claimed that under Rev. Stat. §5198 it could be sued only in New Orleans, where it was located. The trial court denied the bank's claims, and the Supreme Court of Louisiana affirmed. On writ of error, this Court affirmed, holding that Rev. Stat. §5198 "relates to transitory actions only, and not to such actions as are by law local in their character." *Cf. Collett v. Adams*, 249 U. S. 545 (1919).

If this Court had thought that the statute does not apply to any actions against national banks commenced in state courts, it would not have made any distinction between transitory and local actions; but the Court expressly stated that the statute does relate to transitory actions in state courts. The *Casey v. Adams* decision is not referred to in the opinion of the Court in the later *Mor[illegible]* case.

In the case at bar, the Texas Supreme Court did not base its decision on the narrow exception made in *Casey v. Adams* for local actions. From appellee's pleading it is obvious that this plenary civil action for damages is a typical transitory action, in no way "local" in nature.

Federal decisions subsequent to the *Morgan* case indicate its continued authority. No Supreme Court decision has passed again on the question directly.

In *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416 (1916), the Attorney General of Michigan had brought a quo warranto proceeding against a national bank in a state court. Similarly to the *Bethel* case, supra p. 33, one of the questions involved was whether the proceeding could be maintained in the state court. Similarly to the *Morgan* case, apparently, no assertion was made by the bank that venue was improper, and the bank defended on the merits alone. See 244 U. S. at 421. The majority opinion concluded that the quo warranto proceeding could be maintained in the state court. In this connection, incidental support was found generally in §57 of The National Bank Act, apart from any specific venue issue of which none was present in the case (244 U. S. at 428):

> "And our conclusion on this subject is fortified by the terms of §57, chap. 106, 13 Stat. at L. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although, without the grant of the act of Congress, such controversies would have been Federal in character."

The dissenting justice in the case pointed out with regard to §57 (244 U. S. at 431):

> "The provision cited from the Act of 1864 has been in the statutes for fifty-three years, and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to

> that purpose. They have hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the Federal or territorial court of the district in which it is established, the provisions adds, 'or in any state, county or municipal court in the county or city in which said association is located.' This bank, as the record discloses, is located in Bay City, Bay County. The proceeding was begun and had in the supreme court of the state at the capitol, which is Lansing, Ingham County. Therefore the provision can give no support to the proceeding."

The *Morgan* case and the other foregoing decisions all involved either §57 of The National Bank Act or its present successor, Rev. Stat. §5198. All involved the construction and application of the federal statute insofar as it related to actions against national banks in state courts. In each, with the exception of the *Cadle* case, the action had been brought in the same state where the national bank was located. If the federal circuit court in New York and this Court had considered that the federal statute did not apply to actions brought in state courts against national banks, all of the cases could have been disposed of readily on the ground that Congress had not intended for the federal statute to apply to actions against national banks commenced in state courts.

Other Supreme Court decisions involving the federal statute lend force to the present vigor of 28 U. S. C. §94 and the *Morgan* interpretation of its effect.

In *Bank of America v. Whitney Central Nat. Bank*, 261 U. S. 171 (1923), Bank of America, a New York corpora-

tion, brought action in the federal court for the Southern District of New York against Whitney Central National Bank, a national bank with its banking house and usual place of business at New Orleans, Louisiana. The defendant appeared specially, challenged the jurisdiction of the court, and moved that the service be set aside. This Court concluded that the defendant was not in New York and could not be served or sued there. This Court stated (261 U. S. at 173):

> "Whether a national bank could, under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

In a footnote relating to this passage the Court referred to Rev. Stat. §5198 and *First Nat. Bank v. Morgan*, 132 U. S. 141.

Cope v. Anderson, 331 U. S. 461 (1947), was one of several cases arising out of the insolvency and receivership of the National Bank of Kentucky. In discussing an unrelated question of limitation, this Court cited 12 U. S. C. §94 for the proposition that a national bank can be sued only in its own district.

Federal courts of appeals have construed R. S. §5198 (12 U. S. C. §94) on at least two occasions, in each case consistent with the obligatory effect of the statute for which we contend. *Leonardi v. Chase National Bank of the City of New York*, 81 F. 2d 19 (2d Cir., 1936); *Buffum v. Chase Nat. Bank of the City of New York*, 192 F. 2d 58 (7th Cir., 1951). In the latter case the court stated that "it seems clear

that the proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U. S. C. A." While these decisions involved actions in federal courts, they nevertheless involve the same statute. In view of the wording of the statute there is no warrant for interpreting it one way as to actions in federal courts and another as to action in state courts.

We respectfully submit that the Texas Supreme Court has failed to follow the controlling federal decisions construing the federal statute involved, and "under the name of state practice" it has deprived appellant of its statutory right.

C. State Decisions.

Before this Court decided the *Morgan* case in 1889 the state courts of New York and of Massachusetts had construed Section 57 of The National Bank Act. In *Cooke v. State Nat. Bank*, 50 Barb. 339 (1867), affirmed, 52 N. Y. 96 (1873), the New York court had held that the federal statute was "permissive" and not mandatory. In *Crocker v. Marine National Bank*, 101 Mass. 240 (1869) the Massachusetts court held (101 Mass. at 242):

> "This section manifests the intention of congress that each of these associations should be sued, either in the federal or in the state courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases."

In the *Cadle* case in 1873, supra, p. 32, the Massachusetts *Crocker* case was cited and followed. In its opinion in the *Morgan* case in 1889 this Court also cited it.

In 1929 the New York court recognized the holding of this Court in the *Morgan* case and repudiated the earlier New York cases holding that the right granted by the federal statute was permissive. *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 233 N. Y. S. 301 (1929). The Texas Supreme Court in the present case relied heavily on the North Carolina decision in *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194 (1924), which in turn relied primarily on New York cases decided prior to 1889, since repudiated in New York in 1929. The applicability of 12 U. S. C. §94 in state court actions is thoroughly examined, and the statute held persuasively to be mandatory in the leading state court case of *Monarch Wine Co. v. Butte*, 113 Cal. App. 2d 833, 249 P. 2d 291 (1952).

The principal state court decisions on this question are set forth in Appendix C hereto. It is apparent from a reading of these that the courts of the several states which have ruled upon the question involved herein are in irreconcilable conflict, in spite of the fact that the federal decisions, which should control state courts in construing federal statutes, have been in accord from 1873 to date. The most recent state court case which completely ignores these federal decisions is that of the Supreme Court of Nebraska in *Hills v. Burnett*, 172 Neb. 370, 109 N. W. 2d 739 (1961). As to such state court cases, we heartily endorse the statement below of the Court of Civil Appeals in this case, that "we have been struck by

the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous" (R. 362).

D. State "Permissive" Interpretations Render the Statute Meaningless.

The state courts that have proceeded on the theory that the use of the word "may" in the statute renders it "permissive" and not mandatory have failed to recognize that this theory actually renders the statute meaningless. The word "may" appears only once in the statute. Section 5198 is permissive only in the sense that it contemplates that complainants against a national bank may (1) proceed in the federal court in the district in which the bank is established or may (2) proceed in a state court in the county in which the national bank is located. If Congress had merely meant that actions against national banks may be brought in the federal district court held within the district in which such association may be established or in any other federal district court, it would have said that such actions may be brought in any federal district court. Likewise, as to actions in state courts Congress would have said that the actions may be brought in any state court. In *Crocker v. Marine National Bank*, 101 Mass. 240 (1869), the plaintiff had contended that Section 57 of The National Bank Act was "merely permissive." In answer to this contention the Massachusetts court said (101 Mass. at 242):

> "But, according to their construction, so much of it as relates to courts of the United States would seem to have no effect, except in the case of a plaintiff residing in

> the district in which the association is established; and so much of it as relates to the state courts would seem to be wholly useless and superfluous."

This Court's opinion in the *Morgan* case cited and followed this Massachusetts case.

In *Monarch Wine Co. v. Butte*, 113 Cal. App. 2d 833, 249 P. 2d 291 (1952), the California court pointed out:

> "If it was intended that the national bank could be sued in any county of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located'."

The conclusion that the federal statute mandatorily controls and limits venue of actions in state courts against national banks involves as a necessary corollary the conclusion that a state statute does not and cannot control the venue of such actions. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 52-3 (1941). Otherwise, a state statute could modify or even nullify a federal statute controlling a federal instrumentality. In *Crocker v. Marine National Bank of New York*, 101 Mass. 240 (1869), the Massachusetts court observed this inevitable consequence of recognizing the applicability of the federally-created right (101 Mass. at 242):

> "The whole purpose of the eighth section appears to have been to clothe the association with the attributes of a corporation, including that of suing and being sued. Unaccompanied by further legislation, that would have left the jurisdiction over suits against it to be regulated, according to the subject matter involved or the parties interested, by the existing laws of the United States and the several states respecitvely. But the fifty-seventh section designates not only the judicial district of the courts

> of the United States, but the locality of the state courts, within which suits may be brought against such associations; and, by thus regulating the whole subject of suits against such corporations, so far supersedes all other rules, or, to speak more accurately, prevents them from ever applying to such suits."

The Texas Supreme Court's opinion in the present case is the first authority we have found that even suggests that the presence or absence of a state statute on venue has anything to do with the construction of the federal statute on venue of actions against national banks. If Congress had intended to permit the states to deal as they might see fit with this subject, it could have so provided.

E. The Unwarranted Holdings Below as to Congressional Intent.

The Texas Supreme Court stated its belief that "it was not the intention of the Congress in adopting 12 U. S. C. Section 94 * * * that it was to control with respect to an action against a national bank commenced in a state court" (R. 369). We have examined the history of the debates in Congress in vain for any indication of such negative intent. Indeed, we have found no discussion on the floor of Congress, or any other indication of the mind of the legislature extrinsic to the statute itself, as to its intended meaning. As we have shown, a parsing of the text of the statute itself requires the conclusion that Congress meant exactly what it said.

In its opinion in the present case the Texas Supreme Court also states that the "enactment of Section 4, Chapter 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not

mean the repeal of the section of the Banking Act, now designated as Section 94 * * * but indicated the intention of the Congress to limit the Act so as to apply only to actions against a national bank commenced in a federal court" (R. 373-374). The Texas Supreme Court concludes erroneously that Section 1348 of the Judicial Code of 1948 (28 U. S. C. § 1348) merely reenacted the language of the 1882 act.

Section 1348 of the Judicial Code of 1948 (28 U. S. C. §1348), reads as follows:

> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

In fact, this Section 1348 reenacted the language of Chapter 231, Section 24 of the Act of March 3, 1911 which enacted the Judicial code of 1911 [36 Stat. 1087, 1092, 28 U. S. C. §41 (16)]. The second sentence of former 28 U. S. C. §41 (16) and the second paragraph of 28 U. S. C. §1348 (1948) re-enacted almost verbatim the first grammatical paragraph of Section 4 of the Act of August 13, 1888 (25 Stat. 433, 436). In *Continental National Bank v. Buford*, 191 U. S. 119 (1903), this Court carefully considered the pertinent provision of the Act of July 12, 1882 (22 Stat. 162) and of the

Act of August 13, 1888, and emphatically concluded (191 U. S. at 123-124):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by, and exercised their powers under, acts of Congress. No other purpose can be imputed to Congress than to effect that result." [Citing *Ex parte Jones*, 164 U. S. 691 (1896)].

See, also *Petri v. Commercial National Bank of Chicago*, 142 U. S. 644 (1892).

The Act of June 25, 1948 (62 Stat. 869), was described as an act to revise, codify and enact into law Title 28 of the United States Code entitled "Judicial Code and Juidiciary." 28 U. S. C. §1348 is part of Chapter 85 captioned "District Courts; Jurisdiction." At the end of this Act of June 25, 1948 there appeared Section 39 stating that "the section or parts thereof of the * * * Revised Statutes of the United States or Statutes at Large enumerated in the following schedule are hereby repealed" (62 Stat. 992). The schedule referred to (62 Stat. 992-1009), includes the 1882 act and the 1888 act but does not include any part of the act of June 3, 1864, or of Rev. Stat. §5198, or of Title 12 of the U. S. Code. In statutory construction there is a presumption against implied repeals, and the existence of a specified repealer provision indicates that further repeals, by implication, were not intended. 1 SUTHERLAND, STATUTORY CONSTRUCTION (3rd Edition) §§2014-2015, pp. 468-471.

In *International Refugee Organization v. Bank of America*, 86 F. Supp. 884 (S. D. N. Y. 1949), the court held:

> "No change was made in T. 12 U. S. C. A. §94 by the 1948 revision of Title 28, and said §94 is in full force and effect."

A recent report of the Senate Committee on Banking and Currency indicates its assumption that 12 U. S. C. §94 is still in full effect.*

It is apparent that the Texas Supreme Court in its conclusion as to an implied limitation of Rev. Stat. §5198, arrived at such construction without proper consideration of the legislative history of the subsequent statutes or of the major decisions of this Court concerning them.

F. Summary.

The rejection of 12 U. S. C. §94 by the Texas Supreme Court is not justified, either upon the language of the statute itself, or upon the decisions of this Court under the statute, or upon consideration of the legislative history of the statute and related legislation.

CONCLUSION

The trial court in Texas and the Texas Supreme Court have denied the existence of appellant's federal right and

---

*S. REP. No. 121, 85th Cong., 1st Sess. (1957), Committee on Banking and Currency of the United States Senate. The committee was dealing with the Financial Institutions Act of 1957, S. B. 1451. As to §69 of the bill, which restated almost verbatim 12 U. S. C. §94, the Committee commented:

> "Section 69. Venue of actions.
>
> "'This section, dealing with the courts in which actions against national banks may be brought, is the same as title 12, United States Code, section 94, except obsolete reference to circuit courts deleted'."

The bill passed the Senate but was not passed by the House.

deprived appellant of the benefit of it. This Court has jurisdiction to review the final judgment entered by the Texas court depriving appellant of that right. Only by review now in this Court and reversal of the judgment of the Texas Supreme Court can appellant's right be effectively recognized and protected.

In its plea of privilege in the trial court appellant prayed that the trial court enter its order transferring the case as to appellant to a state civil district court in Dallas County, Texas. This prayer was in accordance with the federal right granted in Rev. Stat. §5198 (12 U. S. C. §94), and with Rule 89 of the Texas Rules of Civil Procedure relating to transfer of venue.

The judgment of the Texas Supreme Court should be reversed, and the cause remanded with a direction that the Texas Supreme Court order transfer of appellee's action against appellant to a state civil district court in Dallas County, Texas. 28 U. S. C. §2106.

Respectfully submitted,

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PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 29, 1961, I served copies of the foregoing brief of appellant on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

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APPENDIX A

TEXAS RULES OF CIVIL PROCEDURE

RULE 86. PLEA OF PRIVILEGE

A plea of privilege to be sued in the county of one's residence shall be in writing and sworn to, and shall state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of process therein, nor at the time of filing such plea, a resident of the county in which suit was instituted, and shall state the county of his residence, and the post office address of himself or his attorney and that "no exception to exclusive venue in the county of one's residence provided by law exists in said cause"; and such plea of privilege when filed shall be prima facie proof of the defendant's right to change of venue; provided that such plea shall not constitute a denial under oath of any allegations of plaintiff's petition required to be denied under oath by Rule 93 unless specifically alleged in such plea. A copy of such plea of privilege shall be served on the adverse party or his attorney of record by actual delivery in person to him or by mailing a copy of such pleading to him by registered mail return receipt requested. If such adverse party desires to controvert the plea of privilege, he shall within ten days after he or his attorney of record received the copy of the plea of privilege file a controverting plea under oath, setting out specifically the grounds relied upon to confer venue of such cause on the court where the cause is pending.

RULE 87. HEARING ON PLEA

Upon the filing of such controverting plea the judge or justice of the peace shall note on same a time for a hearing on the plea of privilege. Setting of the date for such hearing and the notation thereof may be made by such judge or justice of the peace anywhere he may be found, either within or without the county where the suit is pending. Such hearing, unless the parties agree upon the date, shall not be had until a copy of such controverting plea, including a copy of such notation thereon, shall have been mailed by registered mail to the de-

fendant or his attorney at the post office address stated in such plea of privilege, or shall have been delivered to defendant or his attorney, at least ten days before the date set for hearing, after which the court shall promptly hear such plea of privilege and enter judgment thereon. If the defendant demands a trial by jury on the venue question, the court, in its discretion, may require the cause to be tried on its merits at the same time.

APPENDIX B

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 545-7 (1949):

[Opinion as to appealability]

"At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 USC 1948 ed §1291 provides, as did its predecessors, for appeal only 'from all final decisions of the district courts,' except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

"The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present

order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeny*, 1 Pet. (US) 567, 569, 7 L ed 265, 266; *United States v. River Rouge Improv. Co.*, 269 US 411, 414, 70 L ed 339, 343, 46 S. Ct. 144; *Cobbledick v. United States*, 309 US 323, 328, 84 L ed 783, 786, 60 S. Ct. 540.

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

APPENDIX C

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No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I.T.C. INSURANCE COMPANY,
Appellee.

No. 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

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No. 90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

No. 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE APPPELLEE

PRELIMINARY STATEMENT

A single brief is filed by Appellee in reply to the separate appeals by MERCANTILE NATIONAL BANK AT DALLAS and REPUBLIC NATIONAL

BANK OF DALLAS, since the two appeals involve a single record, the same issue, and are to be submitted together.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas (R. 365-374) is reported at 341 S.W. (2d) 161.* The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 351-363) is reported at 331 S.W. (2d) 349 (Tex. Civ. App. 1960), there being no official reports for Texas Courts of Civil Appeals.

STATUTES INVOLVED

FEDERAL STATUTES

1. 12 U.S.C., Sec. 24 (1940 Ed.) (12 Stat. at L. P. 668, Section 11; 13 Stat. at L. P. 101, Section 8; Rev. Stat. of U.S., Sec. 5136): (Banks are empowered)

   "FOURTH. To sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons."

2. 12 U.S.C., Sec. 94 (1940 Ed.) (Rev. Stat. Sec. 5198; 18 Stat. at L. 320; 36 Stat. at L. 1167):

   "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such

*Not yet officially reported.

association may be established, or in any State, County, or municipal Court in the County or City in which said association is located having jurisdiction in similar cases."

3. APPLICABLE STATUTES AT LARGE:

(1) 22 Stat. at L. 162 (Act of July 12, 1882):

"That any association so extending the period of its succession shall continue to enjoy all the rights . . . granted and shall continue to be subject to all the duties . . . imposed by the Revised Statutes of the United States and other Acts having reference to National Banking Associations; and it shall continue to be in all respects the identical association it was before the extension of its period of succession: PROVIDED, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

STATE STATUTES

(1) Article 21.28 of the INSURANCE CODE OF TEXAS, as amended, (Acts 1955, 54th Leg.,

pp. 737, 742, Ch. 267), captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers," Section 4(f):

> "Sec. 4. Actions.
>
> ". . .
>
> "(f) NEW LAWSUITS. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings insituted after the commencement of delinquency proceedings by or against the insurer or receiver."

(2) Article 21.28 of the INSURANCE CODE OF TEXAS, Section 1(f), in which the word "Court" is defined as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this article, means the Court in which the delinquency proceeding is pending."

STATEMENT

The plaintiff, C. H. LANGDEAU, is the duly appointed statutory Liquidator-Receiver for I.T.C. Insurance Company, a defunct Texas Insurance Corporation. He was appointed by the 98th District Court of Travis County, Texas, after a finding of insolvency, under the provivsions of Article 21.28, Section 2(a) of the Insurance Code of Texas. (R. 1-2, 346, 347).

This suit was instituted in the 98th District Court of Travis County, Texas, the same District Court in which the delinquency proceedings are pending, pursuant to the provisions of Article 21.28, Section 4(f), (Insurance Code of Texas), providing (R. 1, 366):

> "NEW LAWSUITS. The Court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The word "Court," is defined in Section 1(f) of Article 21.28, (Insurance Code of Texas), as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this arctile, means the Court in which the delinquency proceeding is pending."

The Receiver alleges that I.C.T. Insurance Company is a Texas Insurance Corporation, organized by a promoter named BEN JACK CAGE, who became its President, with intent to defraud the stockholders, policyholders and creditors; that he promoted the Company by credit sales of stock to members of organized labor and others; that I.C.T. Insurance Company was insolvent at the time of its inception and remained insolvent for the several years of its existence; that the various defendants in this suit joined at one time or another the conspiracy of the promoter and officers of the corporation to

fraudulently secure annual licenses from the Texas Board of Insurance on behalf of the corporation, when it was in fact insolvent, resulting in a fraud on its creditors, policyholders and stockholders. Specifically, the two Banks are charged with making large loans to the President of the corporation, BEN JACK CAGE, individually, and/or other individual defendants, on December 31st of each year, which sums were directly deposited by the Banks to the account of I.C.T. Insurance Company on deposit tickets made out by an officer of the Bank; said loans being made pursuant to loan committee's written memoranda that they were to be paid back three days later, on January 2nd, of the following year, and that such deposits were restricted and not subject to withdrawal; that each of said Banks knew, or in the alternative should have known, that the deposits of such large sums to the credit of I.C.T. Insurance Company, without a corresponding liability, was for the purpose of enabling the Insurance Company to support a financial statement that would satisfy the Board of Insurance Commissioners of Texas as to its solvency, and thereby induce such Board to grant a license for the succeeding year. It is alleged that as a result of these and other acts by the two Banks and other defendents, that I.C.T. Insurance Company, although in fact insolvent, was able to continue in business, selling millions of dollars worth of stock to organized labor and others, and to issue policies to thousands of policyhollers, and to thereby ultimately cause them losses totalling approximately fifteen million dollars. (R. 70, 71, 79, 80, 129, 130, 131, 168 through 172, 207 through 210.)

The two National Banks, Appellants herein, filed Pleas of Privilege under the Texas practice, asserting their absolute privilege to be sued in Dallas County, Texas, the County of their location, under the provisions of 12 U.S.C., Sect. 94 (1940 Ed.). (R. 324, 325).

The trial Court overruled both Pleas of Privilege (R. 343, 344), and the Supreme Court of Texas sustained the ruling of the trial Court (R. 365), and this matter is now before this Honorable Court on the single question as to whether or not in this peculiarly local statutory proceeding brought under the provisions of the Insurance Code of Texas by the statutory Liquidator-Receiver, in the Court in which the delinquency proceedings are pending, the Banks have an absolute right or privilege to be severed from this cause and be tried seperately from the corporate promoters, officers and directors, who are alleged to be co-conspirators in the fictitious year-end loans which enabled the I.T.C. Insurance Company to stay in business.

SUMMARY OF ARGUMENT

1. This appeal should be dismissed for want of jurisdiction, because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C., Section 1257.

2. Congress has authorized National Banks "to sue and be sued, complain and defend, in any Court of law and equity as fully as natural persons." (12 U.S.C., Sec. 24). This authorization effective-

ly grants consent for National Banking Corporations to sue and be sued in both Federal and State Courts otherwise possesing jurisdiction under the the respective Constitutions and Laws; and Congress did not intend by 12 U.S.C., Sec. 94 (18 Stat. at L. 320, 36 Stat. at L. 1167, Revised Statutes of U.S., Section 5198), to disrupt the established jurisphudence of the States and to make it impossible in many instances for National Banks "to sue and be sued," in either State or Federal Courts, thereby creating a "no-man's land area" where no court, Federal or State, can entertain suits. Since a National Bank can only sue or be sued in a Federal Court under the same jurisdictional circumstances as individual citizens and corporations of the States in which they are located, and since National Banks can only sue and be sued in State Courts pursuant to the locality of actions according to State law, there are necessarily many instances in which it would be impossible for a National Bank to sue or be sued in either State or Federal Courts.

3. 12. U.S.C., Sec. 94, as originally enacted June 3, 1864, when viewed in its historical background, was an affirmative authorization for a National Bank, as a Federal Corporation, to sue and be sued in designated Courts, and not a limitation or restriction as to Courts otherwise possessing jurisdicition.

4. In the event 12 U.S.C., Sec 94 is construed to limit State Courts having jurisdiction of proceedings by or against National Banks, then it was expressly repealed by the provisio to the Act of

July 12, 1882, as being in conflict therewith. (22 Stat. at L. 162).

5. This suit is a "local action" by State Statute, within the rule of CASEY vs ADAMS, 102 U.S. 66, 26 L. Ed. 52, and is not controlled by the provisions of 12 U.S.C., Sec. 94; it being a suit brought by the statutory Liquidator-Receiver of an insolvent Insurance Company under the Insurance Code of Texas, which requires all suits by or against the Liquidator-Receiver be brought in a Court of competent jurisdiction of the County in which the delinquency proceedings are pending. Art. 21.28, Section 4(f), Insurance Code of Texas.

ARGUMENT

I.

Jurisdiction Of The Court

This appeal should be dismissed for want of jurisdiction, because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C., Section 1257.

It is respectfully submitted that the case at bar does not meet the tests of jurisdiction as heretofore established by this Court and by the Federal Statutes.

This cause in its entirety involves in excess of one hundred parties, only two of whom are involved in the instant appeals. It is highly conceivable that other questions of federal import will be

raised in a trial on the merits of the cause, either by Appellants or other parties to the suit. To try one fragmentary part of the entire proceeding at this time would militate against the rules heretofore laid down by this Court respecting piecemeal review. MONTGOMERY BUILDING AND CONSTRUCTION TRADES COUNCIL vs LEDBETTER ERECTION COMPANY, INC., 344 U.S. 178, 97 L.Ed. 204, 73 Sup.Ct. 196; REPUBLIC NATURAL GAS CO. vs OKLAHOMA, 334 U.S. 62, 92 L.Ed 1212, 68 Sup.Ct. 972.

Furthermore, should Appellants be successful in obtaining a judgment in their favor on the merits of this cause, Appellants would undoubtedly acquiesce in the original determination of the venue issue. REPUBLIC NATURAL GAS CO. vs OKLAHOMA, supra.

Appellants' argument that the venue question may become moot if not reviewed by the Court at this time is effectively dealt with in this Court's opinion in MONTGOMERY, supra, where the Court stated:

> "It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such agrument may be, it does not warrant us in enlarging our jurisdiction. Only Congress can do that."

This is an appeal from an interlocutory determination of venue in an action by the state-ap-

pointed Receiver of a defunct insurance corporation against Appellants and other defendants.

Pursuant to state practice, there has been absolutely no determination of any aspect of the merits of this case. The sole and only issue that has thus far been passed upon in this cause is that of venue. WICHITA FALLS & S.R. CO. vs McDONALD, 141 Tex. 555.

It is well settled that this Court is not bound by state practice in determining the finality of a judgment of a state court for purpose of determining jurisdiction on appeal. It is also well settled that the judgment appealed from must be an effective determination of the litigation, subject to no further review or corrcetion, and not a determination of a merely interlocutory step in the proceeding. MARKET STREET RAILWAY CO. vs RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup. Ct. 770; ARNOLD vs UNITED STATES FOR THE USE OF W. B. GUIMARIN & CO., 263 U.S. 427, 68 L.Ed 371, 44 Sup. Ct. 144. In dismissing for want of jurisdiction the Writ of Error in the Arnold case, this Court succinctly stated:

> ", . . . A case may not be brought here by Writ of Error or appeal in fragments; . . . to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all parties, but as to the whole subject matter and as to all the causes of action involved; and . . . if the judgment or decree be not thus final and complete, the Writ

of Error or appeal must be dismissed, for want of jurisdiction."

It is, therefore, submitted that Appellants have failed to demonstrate this Court's jurisdiction in the instant appeals and fall within the language of this Court's opinion in the REPUBLIC NATURAL GAS CO. case, supra, to-wit:

> "Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction." (Citing authorities). "The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."

II.

12 U.S.C., Section 94, Not Intended By Congress To Create A "No-Man's Land" Wherein No Court Has Jurisdiction

Congress in authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," intended that National Banks could sue and be sued in any Federal or State Court otherwise having jurisdiction.

12 U.S.C., Sec. 94, as originally enacted in 1863 and 1864, was not a venue statute. It was undoubtedly intended as a jurisdictional statute, growing out of the historical experience in THE BANK OF THE UNITED STATES vs DEVEAUX, 5 CRANCH 61. It was thought to be necessary as a result of the decision in the DEVEAUX case.

but it is respectfully submitted that it was in fact unnecessary because this authority "to sue and be sued in any Court of law and equity, as fully as natural persons," was much broader.

Congress certainly did not intend by this language of 12 U.S.C., Sec. 94, when taken in its historical setting, to disrupt the established jurisprudence of the States and to make it impossible in many instances for a National Bank to sue or be sued, either in a State or Federal Court.

If the construction urged on this Court by the Appellants is adopted, then Congress will have created an effective "no-man's land area," where no Court, Federal or State, has jurisdiction.

This is well illustrated in the case of OKEECHOBEE vs FLORIDA NATIONAL BANK, 150 So. 124 (Fla. 1933), in which two National Banks, both necessary parties to the suit, were defendants. These two Banks were located in different Counties. The Florida Court effectively described the intolerable situation that would be created by such a construction of the Federal Statute, as follows:

> "If this be not true, then the Complainant below in this case, the appellant here, can never enforce its legal rights for the alleged breach of the contract. Both Banks are necessary parties to the suit. The suit could not be maintained against one under the allegations of this bill of complaint without the other being joined

> in that suit, and, if the Florida National Bank of Jacksonville may not be sued upon its joint contract in Okeechobee County and People's Bank of Okeechobee cannot be sued on its joint contract in Duval County, then there is no jurisdiction in which the complainant may maintain its suit."

This was a case where the two National Banks were necessary parties to the suit, and the presence of both Banks was required before the State Court could proceed. Other illustrations are not difficult to find. Suppose a National Bank sues in a State Court for title to real property located in a County different from that in which the Bank is located. Historically, as well as by Statute, such suits must be brought in the County or District wherein the real property is located. The Texas Statute on this subject, Article 1995, Section 14, Texas Revised Civil Statutes, 1925, states that such suits "must" be brought in the County where the land is situated. This must be true in most, if not all, of the other States of the Union. Yet, Appellants are saying that when a National Bank sues or is sued for title to real property, the suit must be brought in the County wherein the Bank is located. If under State practice, the suit cannot be brought in such County, then no Court, Federal or State, would have jurisdiction of such cause.

Another example is a suit in which a County is a party defendant, and which under local practice must be brought in such County. In Texas this is governed by Article 1995, Section 19, Texas Revised Civil Statutes.

A further example is a suit in which an Administrator of an Estate of a deceased person, or a guardian, is a party defendant, which commonly must be brought in the County wherein the administration or guardainship is pending.

A suit for mandamus against the head of a department of State Government is required in Texas to be brought in Travis County (State Capitol), Article 1995, Sec. 20, Texas Revised Civil Statues.

Suits to revise the proceedings of the County Court in matters of probate must be brought in the District Court of the County in which such proceedings were had. Article 1995, Section 18, Texas Revised Civil Statutes.

It is respectfully submitted that these provisions of the Texas Statutes mandatorily requiring that suits be brought in certain Counties are instances where the rule had a long historical background both in Texas and elsewhere.

It was undoubtedly with these conditions in mind that the Supreme Court of the United States has sustained the jurisdiction (and venue) of State Courts in Counties other than where the National Banks involved were located.

In CASEY vs ADAMS, 102 U.S. 68, 26 L.Ed. 52 (1880), the Supreme Court held that the Act of 1864 containing the same language as 12 U.S.C., Sec. 94, did not control the jurisdiction or venue of a suit to forclose a mortgage on real property

brought in a Parish in Louisiana wherein the land was located, despite the fact that a National Bank located in another Parish was a party defendant and urged that it had to be sued in the Parish wherein the Bank was located.

Likewise, the Supreme Court in FIRST NATIONAL BANK vs FELLOWS, EX REL UNION TRUST COMPANY, 61 L.Ed. 1233 (1917), speaking through Chief Justice White, decided that a quo warranto proceeding instituted at the State Capitol in Michigan in Ingram County could be sustained against the National Bank located in Bay City, Bay County, Michigan. The Bank urged that it could only be sued in its own County, and Mr. Justice Vandeventer in his dissent expressly asserts that in his opinion the Act of 1864 (now 12 U.S.C., Sec. 94) should have controlled.

Appellants urge the case of FIRST NATIONAL BANK OF CHARLOTTF, N. C. vs MORGAN, 132 U.S. 141, 33 L.Ed. 282 (1889). It is respectfully submitted that this case does not decide the point. This was a suit by Morgan against the National Bank to enforce the penalty created by Act of Congress for charging usurious interest. (Revised Statutes of United States, Section 5198). It will be recalled that at this time the language of 12 U.S.C., Sec. 94 was a part of this Usury Section of the Federal Statute. The suit was in a State Court in Cleveland County, North Carolina. The Bank appeared and made a defense to the suit without first entering a plea to the jurisdiction of the Court

or the venue. After losing the case in the trail Court, the National Bank asserted, for the first time, on appeal, that it could only be sued in the County where its Bank was located. Mr. Justice Harlan delivered the opinion of the Court and stated that is was a suit to recover penalty incurred under a law of the United States. He then went on to hold that the Bank had waived its privilege to be sued in the County of its location, and that the State Court in the other County had jurisdiction. Since the right or privilege of the Bank, if it had such, was waived, this case does not decide the point.

Further, this was a suit for a penalty created by Act of Congress by the very same Section of the Statute to which the present day language of 12 U.S.C., Sec. 94 was then appended, and the Court could very well have held that this language did restrict suits for the usuary penalty created by the same Section of the Act.

In addition to the foregoing FLORIDA case, ten (10) other State Courts have decided in particular cases that National Banks can be sued in Counties other than those in which the Banks were situated, and that the Federal Statutes do not control. Only two (2) State cases hold to the contrar

Cases supporting the Majority Rule are:

TEXAS: Guerra vs. Lemburg, 22 S. W. (2d) 336, (1929), (Writ Dis.)

IOWA:	Merchants National Bank of Cedar Rapids vs. Henderson, 254 N. W. 65 (Sup. Ct. Iowa, 1934).
NEW YORK:	Chaffee vs. Glen Falls National Bank & Trust Co., 123 N. Y. S. (2d) 635 (1953); Affirmed 128 N. Y. S. (2d) 539; Appeal to Court of Appeals denied 129 N. Y. S. (2d) 237.
MICHIGAN:	Levitan vs. Houghton Bank, 140 N. W. 1019, 174 Mich. 566 (Sup. Ct. 1913).
MINNESOTA:	DeCock vs. O'Connell, 246 N. W. 885, 86 A. L. R. 41 (Sup. Ct. 1924).
NO. CAROLINA:	Curlee vs. Bank, 187 N. C. 119, 121 S. E. 194, (Sup. Ct. 1924).
WISCONSIN:	Brust vs. Bank, 184 Wis. 15, 198 N. W. 749 (Sup. Ct. 1924).
NEW JERSEY:	Cassatt vs. Bank, 9 N. J. Mis. Rep. 222, 153 A. 377 (Sup. Ct. 1931).
ALABAMA:	Bank vs. Alston, 165 So. 241 (Sup. Ct. 1936).
FLORIDA:	Okeechobee vs. Florida National Bank, 150 So. 124 (Fla. 1933).
CALIFORNIA:	Fresno National Bank vs. Superior Court, 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890).

Cases supporting the Minority Rule are:

CALIFORNIA: Monarch Wine Co. vs. Butte, 249 Pac. (2d) 291, (Dist. Ct. of App.).

OHIO: Lee vs. Bank, 1 Am. L. Dec. 385, 5 Ohio Dec. 21, 2 Cin. Sup Ct. Rep. 298, 13 Ohio Dec. Rep. 913 (1872).

In neither of these two minority cases can it be said that the State Statute was mandatory in fixing jurisdiction and/or venue, and therefore neither of these cases in fact bears on the specific point.

III.

12 U.S.C., Section 94, is Historically an Affirmative Grant and Not a Limitation or Restricton.

12 U.S.C., Section 94, as originally enacted June 3, 1864, when viewed in its historical background, was affirmative authorization for a National Bank, as a Federal Corporation, to sue and be sued in designated Courts, and not a limitation or restriction as to Courts otherwise possessing jurisdiction.

This first National Banking Act of 1863, 12 Stat. at L. 681, also provided in Section 59:

> "And be it further enacted that suits, actions and proceedings by and against any association under this Act may be had in any Circuit District or Territorial Court of the United States held within the District in which such Association may be established."

The National Banking Act of 1863 was repealed by the Act of June 3, 1864, and a new Banking Act was enacted, 13 Stat. at L., Chapter 116. Section 57 of this Act of 1864 included State Courts, as an addition to this language in old Saction 59.

Historical Background

The first National Banking Act of February 25, 1863, 12 Stat. at L. 668, Sec. 11, Fourth, authorized and empowered National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons." The present Statute, 12 U.S.C., Sec. 24 . . . FOURTH, repeats this authority in exactly the same language. This language does not enlarge the jurisdiction of any Court, Federal or State, but it does affirmatively grant authority for a National Bank to sue and be sued in any Court of law or equity, Federal or State, that would otherwise have jurisdiction.

Historically the language of 12 U.S.C., Sec. 94 (1940 Ed.) (13 Stat. at L. Page 116, Sec. 57); Revised Statutes, Sec. 563, 629; Revised Statutes, Sec. 5198; (18 Stat. at L. 320), was thought to be necessary by reason of the decision of this Court in BANK OF THE UNITED STATES vs. DEVEAUX, 5 CRANCH 85 (1809), which decided that the language in the Act of 1791, which granted the first Charter to The Bank of the United States, 1 Stat. 181, authorizing the Bank "to sue and be sued . . . in any Court of record, or any other place whatsoever," did not give the United States Circuit Court jurisdiction, since the then existing Judicial Acts

did not otherwise extend the jurisdiction of the Circuit Courts to include the Bank of the United States in this instance. The Court stated that this power granted to the corporation, ". . . is not understood to enlarge the jurisdiction of any particular Court . . ."

Shortly thereafter, in a subsequent case involving the second Bank of the United States, OSBORN vs. BANK OF THE UNITED STATES, 9 WHEATON 204 (1824), Chief Justice Marshall decided that the new and additional language contained in the Charter, that the Bank should "be made able and capable in law to sue and be sued . . . in all State Courts having competent jurisdiction, and in the Circuit Courts of the United States," authorized the Bank to sue and be sued in the Circuit Courts of the United States, and that Congress had the constitutional power to enact the Legislation.

This new language of the second Bank's charter was the outgrouth of the decision in the DEVEAUX case, and it is to be noted that "State Courts having competent jurisdiction" were included, although no case had decided that a State Court otherwise having jurisdiction under its own Constitution and Statutes would not have jurisdiction of a suit in which a National Bank was a party as plaintiff or defendant.

In fact, Mr. Justice Bradley of this Court, in CLAFLIN vs. HOUSEMAN, 13 U. S. 130, 23 L.Ed. 833, 838 (1876), had the following to say with reference to the DEVEAUX case:

"The case is exactly the same as that of the Bank of the United States. The first bank chartered in 1791 had capacity given it 'to sue and be sued . . . in Courts of record or in any other place whatsoever.'" (1 Stat. at L. 191).

"It was held in BANK vs. DEVEAUX, 5 CRANCH 61, that this did not authorize the Bank to sue in Courts of the United States, without showing proper citizenship of the parties in different states. The Bank *was obligated to sue in the State Courts.*" (Emphasis supplied). . . "The second Bank of the United States had express authority 'to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' . . . In the case of OSBORN vs. THE BANK OF THE UNITED STATES it was objected that Congress had not authority to enable the Bank to sue in Federal Courts, merely because of its being created by an Act of Congress, but the Court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State Courts."

Quite naturally when the first National Banking Act was passed on February 25, 1863, it not only included the language "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," (12 Stat. 668, Sec. 11, . . . FOURTH); and it also contained the language that had been thought necessary as a result of the DEVEAUX case to give the Federal trial Courts jurisdiction, as follows (12 Stat. 681, Sec. 59):

"And be it further enacted that suits, actions and proceedings by and against any association under this Act, may be had in any Circuit, Dis-

> trict or Territorial Court of the United States held within the district in which such association may be established."

This was not a venue statute, but undoubtedly was considered necessary to give jurisdiction as a result of the historical experience in the case of the BANK OF THE UNITED STATES vs. DEVEAUX. This language was supposed to give the Cirucit Court, District and Territorial Courts jurisdiction that they would not otherwise have possessed.

Since the DEVEAUX case it seems to have been thought necessary to specifically authorize suits by or against the Bank of the United States in State Courts, although no case had ever decided that they did not have jurisdiction, by reason of the authority and power "to sue and be sued, in any Court of law and equity, as fully as natural persons." The original National Banking Act of 1863, which had not mentioned State Courts, was repealed and the Act of 1864 was passed, which inculded the following language (13 Stat. 116, Sec. 57):

> "That suits, actions and proceedings against any association under this Title may be had in any Circuit, District, or Territorial Court of the United States held within the District in which such association may be established, or in any State, County or Municipal Court in the County or City in which said association is located, havinug jurisdiction in similar cases."

It is the position of the Appellee, from a historical viewpoint, that it was thought necessary to expressly give the State Courts jurisdiction. This was not

a matter of venue. This is a part and parcel of the same Section that granted jurisdiction to the Federal Courts.

It is Appellee's position that this was a futile and unnecessary attempt by Congress to authorize National Banks to sue and be sued in designated State Courts when broader authority had already been granted to the National Banking Corporations "to sue and be sued . . . in any Court of law, as fully as natural persons." This point is made because Congress possessed no power to enlarge the jurisdiction of State Courts which they possessed under their respective Constitutions and Statutes; and it is submitted that this language is the result of the historical experience in the DEVEAUX case, and was an attempt to grant affirmative authorization, and is not a restrictive Statute limiting jurisdiction or venue.

The Supreme Court in BANK OF THE UNITED STATES vs. DEVEAUX, 5 CRANCH 85 (1809), clearly did not hold that the Circuit Courts of the United States did not have jurisdiction of a suit by or against the Bank of the United States, provided such jurisdiction otherwise existed under the then existing Judicial Acts; nor did it decide that a State Court otherwise having jurisdiction under the Constitution and Statutes of such State would not have jurisdiction of a National Bank. It is respectfully submitted that Chief Justice Marshall in the DEVEAUX case only decided that "this power, if not incident to a corporation, is conferred by every incorporating Act, and is not understood to enlarge the jurisdiction of any particular Court."

By the time of OSBORN vs. THE BANK OF THE UNITED STATES, 9 WHEATON 204 (1824), the Act of Incorporation (of the second bank) included additional language as a result of the DEVEAUX decision, as follows:

> "The Bank shall be made able and capable in law to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in the Circuit Court of the United States."

This language must necessarily have been the result of the decision in the case of BANK OF THE UNITED STATES vs. DEVEAUX, and the language with reference to State Courts having competent jurisdiction must have been added from a fear that the State Courts might not be held to have jurisdiction unless specifically mentioned. This language does recognize that Congress could not enlarge the jurisdiction granted to State Courts by their own Constitution and Statutes.

The truth of the matter is that the Supreme Court, speaking through Chief Justice Marshall in the OSBORN case, actually overruled the DEVEAUX case, although the opinion gives more than passing emphasis to the new language which specifically designated "the Circuit Courts of the United States." A careful reading of the opinion, however, reveals Chief Justice Marshall's stating in regard to the DEVEAUX decision—

> "Whether this decision be right or wrong, it amounts only to a declaration, that a general

capacity in the Bank to sue, without mentioning the Courts of the United States, *may* not give a right to sue in those Courts." (Empahis supplied).

It is respectfully submitted that the language of 12 U.S.C., Sec. 94, was added to the Statute in 1864 for basically the same reason, and was not intended as a limitation on the State Courts that could otherwise assume jurisdiction.

It is Appellee's position that 12 U.S.C., Sec. 24, . . . FOURTH ,authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," has at all times authorized and empowered State Courts otherwise having jurisdiction to entertain suits by and against Banks, and that the further language contained in 12 U. S. C., Sec. 94, with reference to State, County and Municipal Courts was unnecessary and was intended as an affirmative grant of authority rather than a restriction on the jurisdiction of State Courts.

IV.

12 U.S.C. Repealed By the Proviso to the Act of July 12, 1882

The amendment of February 18, 1865, (18 Stat. at L. 320; Section 5198 of the Revised Statutes of the United States), which has come down to us as 12 U.S.C., Sec. 94, if it is to be construed as a restriction on State Court jurisdiction, was repealed by the Act of July 12, 1882 (22 Stat. at L. 162),

which first authorized the extension of Charters to National Banks for an additional twenty years, and then stated:

> "Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun; And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In LEATHER MANUFACTURERS' NATIONAL BANK vs COOPER, 120 U.S. 778, 30 L.Ed. 816 (1887), this Court stated with reference to this Act of 1882:

> "This was evidently intended to put National Banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the Courts of the United States."

However, the language of the Act itself was not limited to jurisdiction of the Courts of the United States, but refers to "jurisdiction of suits thereafter brought by or against (national) banks 'shall be the same as, and not other than, the jurisdiction for suits by or against Banks not organized

under the laws of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun.'"

It is true that the only cases reaching the Supreme Court of the United States relating to this enactment involved the right of removal from State Courts to Federal Courts, and no decision exists with reference to whether this Act of 1882 repealed the conflicting part of Section 5198 of the Revised Statutes of the United States (1874) as amended by the Act of February 18, 1875. (18 Stat. 320).

This Act of 1882 was not repealed by Congress until June 25, 1948, when in passing the new Judiciary Act, it expressly included the proviso to the Act of July 12, 1882, in a long list of Statutes to be repealed, effective September 1, 1948.

As a matter of fact, this Act of 1882 was a part of the Banking Act and not a part of the judiciary provisions, and there is no indication as to why it was included in the repealing provision.

However, if it effectixely repealed the predecessor of 12 U.S.C., Sec. 94, its subsequent repeal sixty-six years later would not re-enact 12 U.S.C., Sec. 94.

V.

12 U.S.C., Section 94, Not Applicable To This Cause, A "Local Action"

This suit is a "local action" by State Statute, within the rule of CASEY vs ADAMS, 102 U.S.

66, 26 L.Ed. 52, and is not controlled by the provisions of 12 U.S.C., Section 94,; it being a suit brought by the statutory Liquidator-Receiver of an insolvent Insurance Company under the Insurance Code of Texas, which requires all suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding are pending, 21.28—Insurance Code of Texas—Section 4(f).)

Article 21.28, Section 2, of the INSURANCE CODE OF TEXAS, provides for the "conduct of delinquency proceedings against domiciliary insurers." It provides that the property and assets of such insurer shall be in the custody of the court (custodia legis) as of the date of the commencement of the "delinquency proceedings;" that the Reciever shall be vested, by operation of law, with the title to all of the property, and the Receiver shall, "subject to the direction of the Court, immediately proceed to conduct the business of the insurer, or to take such steps as may be necessary . . . for the purpose of liquidating, rehabilitating, reinsuring, reorganizing or conserving the affairs of the insuror."

In this case, C. H. LANGDEAU was and is the "Liquidator" designated by the State Board of Insurance, and is the duly appointed Receiver of I. C.T. Insurance Company under the provisions of Article 21.28, Section 2(a) of the INSURANCE CODE OF TEXAS.

C. H. LANGDEAU, Receiver, instituted this suit in the 98th District Court of Travis County, Texas.

the Court and County in which the "delinquency proceedings" are pending, under the express mandatory provisions of Article 21.28, Section 4(f), of said Insurance Code governing the institution of new suits:

> "NEW SUITS. *The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article* shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver." (Empahsis supplied).

The word 'court" is defined in Section 1(f) of Article 21.28, as follows:

> "'Court' unless the same clearly appears to the contrary from the text of this Article, means the court in which the delinquency procedings is pending."

Admittedly the foregoing provisions of the Texas Statutes control the jurisdiction and venue of this action unless 12 U.S.C. Sec. 94 requires that the two Appellant National Banks be severed from the suit and that the suit proceed against them separately from their alleged co-conspirators, the officers and directors of the defunct Insurance Company.

This suit is a peculiarly "local action" in that it involves a Texas Insurance Company, organized under the Insurance Laws of the State of Texas, and regulated and supervised by the State Board of Insurance; it is a corporation whose business is

affected by the public interest; it is an insolvent Insurance Company which is being liquidated under express statutory authority by the "Liquidator" appointed by the State Board of Insurance, who is required by Statute to be appointed Receiver by the Court in which the delinquency proceeding is pending. (Art. 21.28, Sec. 2, Insurance Code of Texas).

The property and assets of the Company are in custodia legis, and the Liquidator is vested with title thereto. The Statute strictly and specifically regulates the Court in which a suit may be brought by or against the Receiver. (Article 21.28, Sec. 2, Insurance Code of Texas).

This case is governed by the decision in CASEY vs. ADAMS, 102 U.S. 68, 26 L.Ed. 52 (1880), which was a suit to foreclose a mortgage on real property brought in a Parish in Louisiana wherein the land was located. A National Bank located in another Parish was a party defendant, and urged that it had to be sued in the County wherein the Bank was located. The Supreme Court overruled the National Bank's plea, with this statement:

> ". . . This (present statute known as 12 U.S.C., Section 94) we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 (present Statute 12 U.S.C., Sec. 24), subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence on the part of Congress to exempt banks from the ordinary rules

> of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared . . ."

This decision expressly included "such suits . . . as were local in their character, either by statute or the common law."

Clearly the present cast is local in character by statute.

CASEY vs. ADAMS did not limit the rule to the historic common law distinction between "local actions" and "transitory actions."

PAGE vs. TOWN OF NEWBURY, 34 Atl. (2d) 218 (1943) — Vermont, points out with reference to statutory local actions:

> ". . . We are not concerned here with what may have been the common law rule as to trial of local actions because, in this respect, that rule has been superseded by our statutes regulating the place where actions shall be brought . . . the case at bar is a local action because it is made so by the provisions of the statute."

This same principle is announced by the Supreme Court of Maine in CENTRAL MAIN POWER CO. VS. MAINE CENTRAL R.R. CO., 93 Atl. 41. (1915):

> "Under this statute replevin is a local action. (Citing authorities). When a statute prescribes the County in which a particular kind of action shall be brought the action is local."

It is respectfully submitted that a fair and careful reading of CASEY VS. ADAMS will demonstrate that it refers to "local actions," both statutory and common law, and is not limited to the common law distinction alone.

Appellants urge that this Honorable Court in FIRST NATIONAL BANK OF CHARLOTTE, N. C. VS. MORGAN, 132 U.S. 141, 33 L.Ed. 282 (1899), is contrary to and overruled CASEY VS. ADAMS. Such is not the case. It did not involve a local action, either at common law or by statute; it did not involve a State statute fixing jurisdiction and venue in a particular County; it did not purport to overrule CASEY VS. ADAMS, and did not cite or mention the case. This case involved a cause of action created by Act of Congress as a penalty for charging usurious interest. The Bank wholly failed to urge in the trial Court lack of jurisdiction or venue, but answered and defended the suit; and after losing, for the first time on appeal, asserted that it could not be sued in a County other than where it was located. The SupremeCou rt only decided that the Bank had waived its personal privilege by appearing and making the defense.

The next case chronologically is BANK OF AMERICA vs. WHITNEY CENTRAL NATIONAL BANK, 261 U.S. 171, 67 L.Ed. 594, wherein

Justice Brandeis expressly refused to determine this very question in the following language:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

Finally, COPE vs. ANDERSON, 331 U.S. 461, 91 L.Ed. 1602, (1946), makes passing reference to 12 U.S.C., Section 94, although it was not in any way involved in the decision of the case.

The decision in CASEY vs. ADAMS has not been overruled or eroded by subsequent decisions, and it is respectfully submitted that the principle announced therein controls this case; it is a local action, and the 98th Judicial District Court of Travis County, Texas has jurisdiction and venue to try this cause.

CONCLUSION

Appellee respectfully submits, first, that this Court does not have jurisdiction of this appeal, because there has been no final judgment entered by the Texas Court in any way disposing of the merits of this cause, but only an interlocutory decision as to venue.

In the event that this Honorable Court finds that it has jurisdiction of this appeal, then Appellee re-

spectfully prays the Court to find that the 98th District Court of Travis County, Texas, the Court in which the delinquency proceedings against I.C.T. Insurance Company is pending, has jurisdiction to hear and determine this cause, and that for all of the reasons set out herein 12 U.S.C., Section 94, does not control the jurisdiction or venue of this proceeding.

Respectfully submitted,

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PROOF OF SERVICE

I, CECIL C. ROTSCH, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 8, 1962, I served copies of the foregoing Brief of Appellee on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 21 1962
JOHN F. DAVIS, CLERK

No. 14

In the

Supreme Court of the United States

OCTOBER TERM, 1961 2

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

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No. 90

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

I

AUTHORITIES RELIED ON BY APPELLEE IN HIS POINT II DO NOT SUPPORT HIS CONTENTIONS CONCERNING THEM.

We wish briefly to call attention of the Court to the following inaccuracies in appellee's characterization of authorities on which he relies in point II of Brief for the Appellee:

A. Federal Decisions

(1) Appellee says of this Court's decision in *First National Bank v. Fellows Ex Rel. Union Trust Company*, 244

U.S. 416 (1917), that "The Bank urged that it could only be sued in its own County." The report of the case does not indicate that the defendant bank urged such a contention in this Court. The opinion of the Supreme Court of Michigan in the case does not indicate that the defendant bank urged any such contention either in the trial court or in the Michigan Supreme Court. *Fellows v. First Nat. Bank*, 192 Mich. 640, 159 N.W. 335 (1916). Accordingly, we pointed out in our opening brief (p. 35) that, like the *Morgan* case, the venue point was apparently not raised and the case was defended on the merits alone.

(2) Appellee implies that what was held and what "the Court could very well have held" in *First National Bank v. Morgan*, 132 U. S. 141 (1889) related to usury penalty suits only. Such implication is incorrect. Mr. Justice Harlan's discussion of "penalties and forfeitures" was necessary to the completely unrelated jurisdiction question involving §9 of the Judiciary Act of 1789. Appellee would flatly so limit the *Morgan* decision in his point V (Brief for the Appellee, p. 33). This Court did not even suggest in the *Morgan* case that Rev. Stat. §5198 (the statute codified in 12 U.S.C. §94) applied only to actions or proceedings against national banks for penalties and forfeitures. Such contention has been forcefully repudiated. *Leonardi v. Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. den.* 298 U.S. 677 (1936).

Appellee's suggestion that in the *Morgan* case the Court had some doubt as to whether the defendant bank had any

such "right or privilege" is completely unjustified in view of the Court's emphatic statement (132 U.S. at 145):

> "But without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, *must have been recognized.*"*

B. State Authorities

(1) Appellee refers (Brief for the Appellee, pp. 14-15) to various Texas venue statutes relating to actions which a national bank might bring *against* certain types of defendants. Such Texas statutory provisions are inapposite, because 12 U.S.C. §94 by its terms relates only to "actions and proceedings *against*" national banks. Moreover, even an action *against* a national bank a co-defendant of one of the types listed by appellee would be transferable in Texas to the home county of the bank. Art. 1995, subd. 4, Tex. Rev. Civ. Stat.; *Tunstill v. Scott*, 138 Tex. 425, 160 S.W.2d 65 (1942).

(2) *County of Okeechobee v. Florida Nat. Bank*, 112 Fla. 309, 150 So. 124 (1933) held—whether rightly or wrongly—that the bank's venue right was unavailable on grounds of contractual waiver and estoppel. Mr. Justice Terrell's carefully-reasoned analysis of 12 U.S.C. §94, in conflict with appellee's contentions, was not questioned by the majority opinion.

*Emphasis ours throughout.

(3) In appellee's citation of state cases (Brief for the Appellee, pp. 17-19), he says that there are "only two (2) State cases to the contrary" to his asserted state majority rule. Appellee overlooks the following state decisions contrary to appellee's contention, listed in Appendix C to Brief for the Appellant: *Crocker v. Marine National Bank*, 101 Mass. 240 (1869); *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 233 N.Y.S. 301 (1929); *Crofoot v. Giannini*, 196 Misc. 213, 92 N.Y.S.2d 191 (1949); *Rabinowitz v. Kaiser-Frazer Corp.*, 198 Misc. 312, 96 N.Y.S.2d 638 (1950); *Zarbell v. Bank of America Nat. Trust & Sav. Ass'n.*, 52 Wash.2d 549, 327 P.2d 436 (1958).

The *Crocker* case was cited with approval by this Court in its opinion in *First National Bank v. Morgan, supra.*

II

THE HISTORICAL BACKGROUND OF THE NATIONAL BANK ACT (1864) DOES NOT JUSTIFY APPELLEE'S CLAIM THAT THE STATE VENUE PROVISION OF 12 U.S.C. §94 IS INEFFECTUAL. THE HISTORICAL CONTEXT OF THE STATUTE REQUIRES A CONTRARY CONCLUSION.

Appellee's history argument (Brief for the Appellee, pp. 12-13, 19-26) attempts to avoid the effect of 12 U.S.C. §94 according to its plain terms by purporting to show a "futile and unnecessary" mistake by Congress in the enactment of the predecessor statute (§57 of The National Bank Act (1864)) now embodied in 12 U.S.C. §94. Attributing to Congress an intention to only legislate with reference to Congress' alleged misinterpretation of two leading deci-

sions of this Court, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), appellee constructs a conclusion that Congress "undoubtedly intended" unnecessarily and vainly to confer upon state courts jurisdiction of suits against national banks, and that the pertinent second clause of §94 is accordingly a nullity.

No such result is warranted by history or otherwise.

First. Appellee cites no authority, and we believe there is none, for his statements as to what Congress "undoubtedly intended", "thought", "did not intend" (Brief for the Appellee, pp. 12-13); "thought necessary" (Id., pp. 20, 23); or was "supposed" to be doing (Id., p. 23). There is no analysis of §57 of the Act itself. Appellee's unsupported conjecture would not support his conclusion, even if inquiry into the minds of Congressmen were proper in considering the plain and unambiguous statute codified in 12 U.S.C. §94. *Ex Parte Collett*, 337 U.S. 55 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). This Court said in *Ex Parte Collett*, in language particularly appropriate to the case at bar (337 U.S. at 61):

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco, Inc. v. Walling* * * *. This canon of construction has received consistent adherence in our decisions."

Second. Appellee's conclusion does violence to the effect given the statute by this Court in *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880) and *First National Bank v. Morgan*, 132 U.S. 141 (1889). The Justices participating in these leading interpretations indicated no awareness of any historically-evident misinterpretation of Supreme Court decisions which appellee would attribute to the members of the Congress.

Third. Lastly, the historical context in which §57 of The National Bank Act was adopted by Congress, itself refutes appellee's contentions.

Congress recognized in 1864 the necessity that national banking associations possess the *capacity* to sue and be sued, and accordingly included in The National Bank Act §8 (12 U.S.C. §24, 13 Stat. 101) a provision enabling national banks to "sue and be sued, complain and defend, in any court of law and equity as fully as natural persons". Similar usual provisions had been contained in the legislation creating the first bank of the United States (1 Stat. 192, §3 (1791)) and the second bank of the United States (3 Stat. 269, §6 (1816)). Apart from the additional, specific federal court provisions included with respect to the second bank, these provisions conferred on the banks only a general capacity to sue and be sued. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) at 817. Contrary to appellee's "jurisdictional" discussion of §8 of The National Bank Act, it had nothing to do with the existence or nonexistence of jurisdiction over the subject matter of actions against national banks in state (or federal) courts.

Enjoying such general capacity, federally-created banks could sue — and be sued — in state courts otherwise possessing jurisdiction over the subject matter of actions to which such a bank might become a party. *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824); *Claflin v. Houseman*, 93 U.S. (3 Otto) 130 (1876). Congress, in the adoption of the second clause of §57 of The National Bank Act (1864), recognized literally in the statute the existence of "state, county, or municipal court[s] • • • *having* jurisdiction in similar cases". Such recognition negatives appellee's suggestion that Congress thought it was trying to *confer* jurisdiction upon state courts of actions against national banks.

There are, however, no federal courts of general jurisdiction in the usual sense. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). The non-exclusive jurisdiction of the lower federal courts generally in 1864 was limited to cases involving diversity of citizenship with the requisite jurisdictional amount. Under *Deveaux* and *Turner* specific legislation would be necessary to confer general non-diversity federal jurisdiction in suits against national banks. *Osborn* did not overrule *Deveaux* (Brief for the Appellee, p. 25), but only held such legislation constitutional.

Congress in the first clause of §57 accordingly conferred upon courts of the United States jurisdiction over the subject matter of "suits, actions, and proceedings against any association under this Act." But there is no warrant for appellee's inference that because Congress in the first clause of §57 thus specifically enacted legislation conferring non-

diversity general *federal* court jurisdiction over suits against banks, that it also meant mistakenly and unnecessarily by the second clause of §57 to legislate to confer *state* court jurisdiction in similar cases.

Congress thus covered questions regarding capacity in §8 of the Act, and the necessary conferral of federal court jurisdiction in the first clause of §57 of the Act. Congress might have said nothing more, leaving state and federal venue to the operation of applicable state or federal law. But Congress instead chose to address itself to the venue of actions against national banks. This it did by the addition of a reference in §57, first clause, to United States courts "held within the district in which such association may be established"; and by addition of the whole second clause of §57 authorizing suits against banks in state or local courts "in the county or city in which said association is located". Such second clause, pertaining in no substantive way to capacity or jusidiction, could only have been included as a limitation on state venue complementary to the comparable provisions regarding federal venue as provided in the first clause.

Appellant submits that if any artificial Congressional "intention" is to be inferred from analysis of The National Bank Act in view of the then-existing fabric of decisional law, such intention must have been that Congress contemplated a comprehensive legislative scheme which recognized the general jurisdiction of state courts and conferred the general jurisdiction of federal courts, in actions against national banks; conferred the necessary capacity upon them to become parties to litigation in all competent courts; and

expressly limited the venue of actions against the banks by the restrictive designations of specific courts in which actions against them could be maintained.

III

AS A MATTER OF FEDERAL LAW AS WELL AS OF STATE LAW APPELLEE'S CAUSE IS NOT A LOCAL ACTION. MOREOVER, IT DOES NOT PURPORT TO BE LOCAL UNDER THE INSURANCE CODE OF TEXAS.

At the outset we wish to dispel the idea that appellant is contending (as stated by appellee, Brief p. 33) that *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880) was overruled by *First National Bank v. Morgan*, 132 U.S. 141 (1889). Neither this appellant nor the appellant in No. 91 has made any such contention in its opening brief. This appellant does urge that the narrow exception to the state venue provisions of Rev. Stat. §5198, for "local actions" announced in *Casey v. Adams* has no applicability to appellee's tort action seeking personal liability for damages herein. The Texas Supreme Court did not pass on the question in its opinion. (R. 396)

This Court held in *Casey v. Adams* that Rev. Stat. §5198, the statute codified in 12 U.S.C. §94, "relates to transitory actions only, and not to such actions as are by law local in their character." The Court pointed out that the "distinction between local and transitory actions is as old as actions themselves," and it continued that "local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." These familiar distinctions led the Court to conclude that the contest in that

case over a fund in the custody of the court, realized from the sale of property in its geographical jurisdiction, was "clearly local in its nature." The Court emphasized that no personal claim was made against the bank.

It is equally clear under the standards of *Casey v. Adams* that the case at bar is no wise local. It involves solely a plenary personal claim for damages to recompense an alleged tort. Such actions are recognized by this Court to be transitory. In *Stewart v. Baltimore & O.R.R.*, 168 U.S. 445, 448 (1897) this Court held that

> "An action to recover damages for a tort is not local but transistory. . . ."

See also *Dennick v. Central R.R. Co.*, 103 U.S. (13 Otto) 11 (1881), holding that an action for trespass to the person is "always held to be transistory".

The allowance or denial of the federal venue right asserted by appellant is a matter of federal law and not state law. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 52-3 (1941). Under the above Supreme Court decisions, appellant's venue privilege does not fall within the "local action" exception to 12 U.S.C. §94.

Texas law differentiating between local and transitory actions, if applicable would require a similar result. The Texas Supreme Court distinguishes between local and transitory actions as follows, *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890):

> "If the cause of action be one that might have arisen anywhere, then it is transitory; if it could only have arisen in one place, then it is local."

See, also, *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 26 S.W. 599 (1894), citing *Casey v. Adams*. Tested by this standard, appellee's action in the present case was a transitory action, because it is one that might have arisen anywhere.

Appellee nevertheless states (Brief for the Appellee, p. 28) that "this suit is a 'local action' by State Statute". For two reasons this assertion does not aid appellee.

First, the distinction between local and transitory actions discussed by this Court in *Casey v. Adams* had reference to basic principles "as old as actions themselves" and not to artificial distinctions based on labels that may be included in state statutes.

Second, §4(f) of Article 21.28 of the Texas Insurance Code does not purport to classify actions by or against the liquidator-receiver as local actions. In *Holt v. Wheeler*, 301 S.W.2d 678 (Tex. Civ.App. 1957, error dism'd) the court said at page 680:

> "Section 4(f) of Art. 21.28 is remedial or procedural because it deals exclusively with venue. It is not a statute dealing with substantive law."

Appellee contends (Brief for the Appellee, p. 29) that the Texas statute "requires all suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding are [sic] pending." Appellee is thus saying that he cannot bring suits in courts outside Texas against parties who cannot be found in Texas, and even that he cannot bring (or maintain removed) suits in the United States courts for

recoveries against third parties, for tax refunds, federal Tort Claims, bankruptcy, etc. The Texas venue statute is not subject to a so unreasonably strained construction.

IV

CONCLUSION

The relief requested by appellant in the Conclusion of its opening brief should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 20, 1962, I served copies of the foregoing brief of appellant on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

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SUPREME COURT, U. S.

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FILED
FEB 23 1962
JOHN F. DAVIS, CLERK

No. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. Insurance Company,
Appellee.

Appeal From the Supreme Court of Texas

REPLY BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

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No. 91

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. Insurance Company,
Appellee.

Appeal From the Supreme Court of Texas

REPLY BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

Appellant, Republic National Bank of Dallas, files this Brief in reply to the Brief filed previously by Appellee. Appellant has subdivided its Reply Brief in much the same way Appellee subdivided his Brief.

I. THE JURISDICTIONAL ISSUE

In this Appellant's Jurisdictional Statement (pp. 2-6), its Brief in Opposition to Appellee's Motion to Dismiss, and its

previous Brief (pp. 9-16), it has set out the reasons why this case meets the jurisdictional requirements of the Supreme Court, to which reference is herein made. The essence of Appellant's position, however, is that unless Appellant can have Supreme Court review at this time it will be irreparably deprived of an important federal venue right. None of Appellee's arguments directly meets this contention.

Appellee cites *Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., 344 U. S. 178 (1952)*, a case which this Appellant discussed in some detail in its Brief in Opposition to Appellee's Motion to Dismiss (pp. 2-4), and in its previous Brief (pp. 11-13). The *Montgomery* case involved appeal of a temporary injunction; jurisdiction was denied. Appellant has previously shown at some length how the present case differs from a temporary injunction. Appellee cites the *Montgomery* case in one other connection, however, which deserves some discussion here. Appellee claims that Appellants have argued that if review is not granted now and the case goes on to trial in violation of *12 U. S. C. §94*, the question of venue will then be "moot." Appellee cites *Montgomery* to show that a question's becoming "moot" is not persuasive in establishing Supreme Court jurisdiction.

Appellee has not properly restated Appellant's argument. Appellant has never claimed the venue issue would become "moot". Most questions involved in litigation are in danger of becoming moot if the proceedings take a long time. Appellant agrees that the possibility of a question's becoming moot because of the time required for litigation is not a valid

basis for establishing Supreme Court jurisdiction. But that is not what Appellant has said. Appellant has argued, instead, that if review is not now granted, Appellant *will* be irreparably deprived of its federal venue right at the moment trial on the merits begins outside Appellant's home county. Involved here is a *certainty* of Appellant's being irreparably injured, rather than a vague possibility that changed conditions will render the question moot. This is a far different situation from that suggested in *Montgomery*, where it was apparently contended that the picketing there involved might be frustrated and the case rendered moot if Appellant had to wait for a permanent decree before appealing.

Appellee also suggests—citing *Republic Natural Gas Co. v. State of Oklahoma*, *334 U. S. 62 (1948)*—that should Appellants be successful on the merits they "would undoubtedly acquiesce in the original determination of the venue issue". The situation involved in *Republic Natural Gas* is quite different from the present case. *Republic Natural Gas* involved the appeal of an Oklahoma State Corporation Commission order allocating the taking of gas between two producers. Appeal was on due process and equal protection grounds. The Oklahoma decree left the matter of compensation for the gas to be decided later. The Supreme Court—in declining jurisdiction—indicated that a favorable decision on compensation might cause the complaining party to acquiesce in its constitutional protests. *Republic Natural Gas*, then, involved a future state determination *of the very question involved in the appeal*, a favorable determination of which might cause the aggrieved party to acquiesce. In our

case there is no future state determination of the venue issue available before Appellant's venue right has been irretrievably lost.

Appellee then restates the well-known rule that the Supreme Court is not bound by state practice in determining questions of appellate jurisdiction. Appellant has never submitted this case on the basis of Texas practice. It *has* submitted this case on the basis of certain *facts*. These facts are mostly derived from Texas practice simply because this case arose through Texas courts. But it is the *facts* on which this case is submitted, not any name or characterization applied by the courts of Texas. These facts have been set out previously, but they can be summarized as follows:

1. There has been a state determination depriving Appellants of a valuable federal venue right.

2. Appellants have exhausted all available means to secure a favorable ruling on the federal venue question in the state courts.

3. The state determination involved only the venue question, and a lengthy, complex and expensive state proceeding will be based on that determination.

4. The state courts will make no further determination of the venue issue.

5. If the United States Supreme Court does not grant review at this time, Appellant will be forced to trial in violation of its federal venue right and thus irreparably deprived of that right no matter what the outcome of the case on the merits might be.

These facts make out a case for review under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949), and *Republic Natural Gas Co. v. State of Oklahoma*, *supra*, where the Court said (at 334 U. S. 68):

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, *because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.*" [Emphasis supplied.]

This case involves an important question for national banks everywhere. Research has revealed an almost shameful flouting of *12 U. S. C. §94*'s venue rules by the state courts. At best there is a serious conflict of authority. This question needs a decision, and the present case in its present context is a suitable one for deciding it.

II. THE EFFECT OF 12 U. S. C. §94

A. Difficulty in applying 12 U. S. C. §94 in other situations is not a basis for holding it inapplicable here.

Appellee's first contention is that Congress "certainly did not intend" by enacting §94's predecessor to "disrupt" the established jurisprudence of the states. Appellant cannot agree with this. Appellant submits that Congress *did* intend to *regulate* the jurisdiction of state courts to hear national bank cases. This intent is clear from a reading of §94: proceedings against a national bank may be had "* * * in any State, county, or municipal court in the county or city in which said association is located * * *". Appellant has shown in its previous Brief (pp. 21-26) that this regulatory intent

is the result of a long-standing Congressional policy that national banks will be treated uniformly the country over, and will not be unduly interfered with by the states. If Appellee wishes to interpret this venue requirement as a "disruption" of state power he may do so, but the United States Supreme Court, in decision after decision, has preferred to uphold federal regulation of national banks, even when that regulation conflicted with state law. See, for example, *McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. 1824); Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875); Van Reed v. People's National Bank, 198 U. S. 554 (1905).* The venue requirement in question should likewise be upheld.

In an effort to bolster this argument, Appellee points out that §94, if construed mandatorily, may present some difficulties in implementation. One of Appellee's suggested difficulties involves the interplay of Texas venue statutes and the federal. He points out various instances where the two conflict. A ready answer to this has been provided by the decision of the Texas Supreme Court in this case (R. 369, *341 S. W. 2d 164*): if Texas venue statutes conflict with the federal statutes, the state statutes must yield. The remedy of Texas and its courts is not to ask the federal government to render its venue statute meaningless; it is—if necessary—to accommodate the Texas venue statutes to the federal statute. If in the 87 years since §94's predecessor was enacted Texas has been unable or unwilling to bring its laws into harmony with federal law, that is no reason at this late

date to ask that the federal government abolish its venue rules.

Appellee's second suggested difficulty involves what happens when national banks located in different counties are indispensable parties to a lawsuit. This situation may or may not have been contemplated when §94's predecessor was enacted. At any rate, that problem is not involved in this case. The only two national banks that are parties here are located in the same county.

Appellant answers this "difficulty of application" argument in two ways. First, the decision of this case should be limited to its facts. Problems which might arise in other fact situations should not be allowed to prevent the application of a statute to a fact situation which that statute is clearly designed to cover. Other fact situations should be decided when they arise.

Second, a statute's failing to cover certain fact situations is no basis for asking the courts to usurp the legislature's function and declare the whole statute invalid. "A casus omissus does not justify judicial legislation," said the United States Supreme Court in *Ebert v. Poston, 266 U. S. 548, 554 (1925)*. To use an analogy, there are situations under the usual federal venue rules when no federal court has venue to hear a case, as, for example, in a transitory diversity action having two indispensable plaintiffs (individuals) residing in different judicial districts, and two indispensable defendants (individuals) residing in different states. *28 U. S. C. §1391 (a), §1392(a); see 1 Moore, Federal Practice, §0.143[1]*. That fact does not give the federal courts the right to aban-

don all federal venue rules, and they assuredly have not. If Congress, in the future, shall choose to correct that situation, well and good. In the meantime, the Courts will abide by the venue rules as they stand. The same considerations apply in our case.

Appellee has cited a number of cases—state and federal—which he claims support his position that difficulty of application renders §94 nugatory. In so doing he has grossly misrepresented many of the authorities he has cited, as well as the number of cases supporting Appellant's position.

Two state cases cited by Appellee in support of a permissive construction of §94 actually indicate that §94 is mandatory. They are: *Chaffee v. Glens Falls National Bank and Trust Company, 204 Misc. 181, 123 N. Y. S. 2d 635 (Sup. Ct. 1953), affd. 283 App. Div. 694, 128 N. Y. S. 2d 539 (1954), leave to appeal to Ct. App. den., 283 App. Div. 793, 129 N. Y. S. 2d (1954)*, and *County of Okeechobee v. Florida National Bank, 112 Fla. 309, 150 So. 124 (1933)*. Although both indicate §94 is mandatory, each allows suit in another county for reasons not existing in the present case (waiver in *Okeechobee*, the state-wide jurisdiction of New York's Supreme Court in *Glens Falls*). Again, Appellee in setting out the state cases supporting Appellant's position lists only two. Significantly he fails to list a number of others: *Crocker v. Marine National Bank, 101 Mass. 240, 3 Am. Rep. 336 (1869); Raiola v. Los Angeles First National Trust and Savings Bank, 133 Misc. 630, 233 N. Y. S. 301 (City Ct. N. Y. 1929); Crofoot v. Giannini, 196 Misc. 213, 92 N. Y. S. 2d 191 (Sup. Ct. 1949); Rabinowitz v.*

Kaiser-Frazer Corp., 198 Misc. 312, 96 N. Y. S. 2d 638 (Sup. Ct. 1950); Burns v. Northwestern National Bank of Minneapolis, 65 N. D. 473, 260 N. W. 253 (1935), and *Zarbell v. Bank of America, 52 Wash. 2d 549, 327 P. 2d 436 (1958)*. These cases are discussed in Appellant's previous Brief (pp. 27-33), along with the federal cases not mentioned by Appellee.

Appellee has attempted to overcome some of the federal cases holding against his position by misconstruing them. *First National Bank v. Fellows, ex rel. Union Trust Co., 244 U. S. 416 (1917)*, does *not* stand for the proposition that a national bank may be sued outside its county. A national bank can waive its venue rights, as demonstrated by *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, and that is certainly what the defendant national bank did in *Fellows*. There is no intimation in the *Fellows* opinion that the defendant bank ever raised the venue issue. Appellee also cites *Casey v. Adams, 102 U. S. 66 (1880)*; that case is discussed *infra*, p. 14, also in Appellant's previous Brief (pp. 33-35). Finally, the *Morgan* case, *supra*, does *not* stand for the proposition that the venue requirements of §94's predecessor apply only in usury cases, as Appellee indicates the Supreme Court "could very well have" decided. *Morgan* was a usury case, but nowhere in the opinion is it even suggested that the venue rules apply only to usury cases (see discussion in this Appellant's previous Brief, pp. 42-43).

Appellant submits that Appellee's "difficulty of application" argument cannot stand, and that the authority given by Appellee in support of it does not support it.

B. Appellee's arguments based on Congressional intent and repeal by implication are totally ineffective because Appellee has failed to differentiate between jurisdiction and venue.

Before discussing Appellee's next two points, it is necessary to clear up some confusion between *jurisdiction* and *venue*. It is elementary that jurisdiction involves the power of a court to hear a case, while venue concerns the proper locale in which a case should be tried. A defect in jurisdiction cannot be waived, while a defect in venue is a personal privilege which may be waived. See *Neirbo v. Bethlehem Shipbuilding Corporation, 308 U. S. 165 (1939)*; also *Federal Underwriters Exchange v. Pugh, 141 Tex. 539, 174 S. W. 2d 598 (1943); Nelson v. Thompson, 64 S. W. 2d 373 (Tex. Civ. App. 1933, error dis.)*, and *Lewright v. Reese, 223 S. W. 270 (Tex. Civ. App. 1920, error ref.)*, indicating that Texas accedes to the usual rules in this area.

The problem here is one of venue, *not* one of jurisdiction. The Supreme Court of Texas has admitted as much (R. 369, *341 S. W. 2d 164*). We are dealing with that portion of *12 U. S. C. §94* relating to *where* national bank cases are to be tried in state courts. The United States Supreme Court has already by implication construed this aspect of §94 as one of venue. Had this problem involved jurisdiction, the order in *First National Bank of Charlotte v. Morgan, supra*, would have been to dismiss the action as having been tried in a forum lacking jurisdiction. Instead, the national bank was held to have *waived* its venue rights by not having raised them.

Appellee has contended, based on *Bank of the United States v. Deveaux, 5 Cranch 85 (U. S. 1809)*, that Congress in enacting §94's predecessor was unnecessarily trying to reinforce the jurisdiction of state courts to hear national bank cases. Appellee continues that §94's predecessor being unnecessary, §94 has no effect.

Congress may or may not have intended to concern itself with state court jurisdiction when it enacted §94's predecessor; whether it did is largely academic in a case dealing solely with venue. What Congress *certainly* did was to enact a law covering venue. That law is clear from §94's language, and must be followed.

All that Appellee has offered to support his "unnecessary enactment" theory is his statement (p. 25) that the statute "must necessarily have been the result of" the *Deveaux* case. More than that is needed to impute to Congress an unnecessary act. Again, even if §94's predecessor did duplicate previous enactments as to jurisdiction, is the result necessarily to invalidate §94, as Appellee contends? In *United States v. Borden Co., 308 U. S. 188, 198 (1939)*, the Supreme Court said, "When there are two acts upon the same subject, the rule is to give effect to both if possible." Thus, even if Appellee's tenuous theory as to Congress' intent were correct, the result would not be to invalidate §94, and certainly not to invalidate it as to venue.

Appellee's argument in 1962 that Congress in 1875 "must have" been influenced by an 1809 case to legislate unnecessarily as to jurisdiction, and that this "unnecessary" act

now renders the statute invalid as to venue as well is highly unsound.

Appellee also says §94 has been repealed. Appellee states that the proviso in the Act of July 12, 1882, ch. 290, sec. 4, 22 Stat. 163, was responsible for its repeal. The 1882 proviso reads as follows:

> "* * * provided, however, that the jurisdiction for suits hereinafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun; * * *."

Appellant discussed in some detail the statutory history and purpose of this proviso in its previous Brief (pp. 37-39), to which reference is herein made. It is, however, necessary to reiterate the interpretation which the United States Supreme Court has twice put on the quoted proviso. In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778 (1887)*, the 1882 act was interpreted as intended to take away from national banks their previously recognized right to go into federal courts solely on the basis of their being federal instrumentalities, and to put them—for purposes of federal court jurisdiction—on the same footing as state banks. In *Continental National Bank v. Buford, 191 U. S. 119 (1903)*, the 1882 act was again interpreted, this time in connection with a later enactment of similar character, the

Act of August 13, 1888, ch. 866, §4, 25 Stat. 436. The Court said (at *191 U. S. 124*):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by and exercised their powers under Acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" [Emphasis supplied.]

In the face of this clear judicial interpretation limiting the effect of the 1882 proviso, Appellee has argued that the proviso's wording, which—for the limited purpose of federal court *jurisdiction*—made national banks and state banks identical, also served to repeal the *venue* aspects of §94. Note also that the wording of the proviso refers only to jurisdiction. Appellant, however, points out that a statute designed only to constrict federal court jurisdiction cannot have the effect of repealing a provision relating to state court venue. To have a repeal other than express, a *sine qua non* is to have two statutes dealing with the same subject matter. The 1882 proviso and §94 do not deal with the same subject matter. To argue that they do, again, is a consequence of confusing venue and jurisdiction.

The 1882 proviso has now been repealed *(Act of June 25, 1948, ch. 646, §39, 62 Stat. 994)*, but even during its life it could not have had the effect of repealing §94 as Appellee contends. §94 stands today in full force and effect.

C. The effect of Casey v. Adams.

Appellee's last contention is that this is a "local action," and as such comes under the rule of *Casey v. Adams, 102 U. S. 66 (1880)* rendering *12 U. S. C.* §94 inapplicable.

This Appellant has discussed the applicability of *Casey v. Adams* in its previous Brief (pp. 33-35). Appellant's first answer to that contention—again—is that the Texas Supreme Court expressly refused to decide this case on the basis of its being a local action. It said (R. 369, *341 S. W. 2d 164*):

> "It is unnecessary to our decision to determine whether this particular action is local or transitory in nature."

Appellant's second answer is that this is *not* a local action; for further discussion and authorities the Court is respectfully referred to the cited portion of Appellant's previous Brief. One further question, however, deserves comment. What standard do we use in determining what is a local action under the *Casey v. Adams* rule? Appellant knows of no case bearing on that problem. That being true, it must be that we refer to *Casey v. Adams* itself to determine what a local action is. It is certainly more in accord with the federal government's policy toward national banks that we refer to a uniform standard (one federal decision) rather than a diverse one (the rules in various states).

Casey v. Adams indicates first, that an action may be local either by common law or by statute, and second, that local actions "* * * are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." *(102 U. S. at 68.)* A definition of local action

containing both the requirements set out in *Casey v. Adams* is the only one which prevents a state from rendering *12 U. S. C. §94* impotent simply by passing mandatory venue statutes. If the only requirement of a local action were that a state statute make venue mandatory, a state could take any type of action, conceivably one having no resemblance to a true local action, and render it impervious to the requirements of *12 U. S. C. §94* by applying mandatory venue to it. This is not a possibility which the Court in *Casey v. Adams* intended. The Court in *Casey v. Adams* was interested in doing away with the difficulty caused by requiring an *in rem* action to be tried away from the property involved; not in raising an exception which would allow the states to render ineffective the venue requirement for national banks.

We come then, to apply the standard of *Casey v. Adams* to this case. Assuredly there is no basis (other than the Texas venue statute, *Sec. 4(f), Article 21.28, Insurance Code of Texas)* for contending that this vast and complex case, a tort action in conspiracy involving 144 defendants located all over the nation, is local. A local action, even under Texas law, is one which could have arisen in only one place, one involving specific property, one with relief acting directly on the subject-matter, not the person. See *Pegram v. Owens, 64 Tex. 475 (1885); Parker v. Mather, 59 S. W. 2d 961 (Tex. Civ. App. 1933, err. ref.); Texas and Pacific Railway Company v. Gay, 86 Tex. 571, 589, 26 S. W. 599, 605 (1894); Employers' Casualty Company v. Ponton, 41 S. W. 2d 147, 149 (Tex. Civ. App. 1931, no writ history).*

The *Casey v. Adams* standard is a dual one. An action may be local by statute, but to be such it must *also* be "in the nature of" a suit *in rem*. This case does not involve specific property; it is not in the nature of a suit *in rem*; and it is not even being prosecuted where I. C. T. Insurance Company was located. (I. C. T. was headquartered in Dallas County, Texas. See Plaintiff's First Amended Original Petition, R. 12.) This case does not meet the definition of a local action set out in *Casey v. Adams*. For that reason, the exception provided for in that case does not apply.

CONCLUSION

For the reasons herein stated, and for the further reasons contained in its Brief previously submitted, Appellant again respectfully requests that the judgment of the Supreme Court of Texas be reversed, that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas be affirmed, and that venue in this case as to the national banks involved be ordered transferred to Dallas County.

Respectfully submitted,

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PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of February, 1962, I served copies of the foregoing reply brief on appellee by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

To Cecil C. Rotsch, Esq.,
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None of the persons on whom service is to be made resides five hundred miles or more from me.

.....

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No. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1962

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

SUPPLEMENTAL BRIEF

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Appellee.

Appeal from the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

Republic National Bank of Dallas files this Supplemental Brief for two reasons. The first concerns appellee's contention that *12 U. S. C. §94* has been repealed or modified by later legislation. Secondly, since this case was submitted previously, the Texas Supreme Court has rendered a decision which should lay at rest appellee's claim that his action filed below is a local action.

The first issue, more specifically stated, is this: Republic National Bank relies on *12 U. S. C. §94* as supporting its position that the Texas Supreme Court erred in not ordering this suit as to it transferred to Dallas County, Texas. The statutory basis for that code section is an amendment to §5198, Revised Statutes of 1873; this amendment was enacted by ch. 80, Act of February 18, 1875, 18 Stat. 320. Appellee in his brief, and the Supreme Court of Texas in its opinion in the present case, refer to theories that this 1875 legislation has been repealed or modified by later enactments. Appellant touched on these theories in its brief (pp. 35-41) and its reply brief (pp. 12-13), and sought to show that they are insupportable. When this case was previously submitted on oral argument, certain questions by the Court indicated some interest in that contention, but on account of the limitation of time for argument that point was not covered as thoroughly as it might be. In response to that interest, appellant will examine in the first part of this brief appellee's claim of repeal in greater detail than has been done up to now, and show thereby that the 1875 enactment—as it affects this case—has not been repealed or modified by later legislation.

The second portion will be devoted to an examination of a recent Texas Supreme Court decision, *Langdeau v. Burke Investment Company, Tex. , 358 S. W. 2d 553* (delivered on June 20, 1962, since the prior submission of this case) and the effect of the holding therein on appellee's claim that this is a local action so as to come within the rule of *Casey v. Adams, 102 U. S. 66 (1880).*

I. APPELLEE'S CLAIM THAT 12 U.S.C. §94 HAS BEEN REPEALED OR MODIFIED BY LATER LEGISLATION IS INSUPPORTABLE.

A. Statutory matter; Basis of the claimed repeal.

At the outset, it is appropriate to set out for reference the statutory matter here involved. First, the 1875 enactment reads as follows:

> "That suits, actions, and proceedings, against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which said association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

This wording, modified in some particulars not here relevant,[1] now appears as *12 U. S. C. §94*. It was derived from wording which appeared in *§57 of the National Bank Act of 1864*,[2] reading as follows:

> "Sec. 57. That suits, actions and proceedings, against any association under this act, may be had in the circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases; *Provided, however*, That all proceedings to enjoin the comptroller under this

[1]The original 1875 wording is now reflected as 12 U. S. C. §94 with slight modifications in wording. §94 refers only to "Actions and proceedings", where the original wording was "Suits, actions, and proceedings". The 1875 wording referred to "* * * any circuit, district, or territorial court of the United States, * * *"; the reference to circuit courts is deleted in §94. The 1875 word "title" becomes "chapter" in §94, and the first 1875 reference to "said association" becomes "such association".

[2]§57, ch. 106, Act of June 3, 1864, 13 Stat. 116.

act shall be had in a circuit, district, or territorial court of the United States, held within the district in which the association is located."

Appellee relies on §4, *ch. 290, Act of July 12, 1882, 22 Stat. 163*, in support of his contention that the 1875 legislation has been repealed [his brief, pp. 26-8]. The particular portion he relies on is the proviso, which reads:

> "* * * *Provided, however*, That the jurisdiction for suits hereinafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws or parts of laws in the United States inconsistent with this provision be, and the same are hereby, repealed."

This proviso has since been expressly repealed.[3]

In addition, certain legislation, passed in 1887 and re-enacted in 1888, was relied on by the Texas Supreme Court as responsible for repeal of the 1875 legislation. (See *161 Tex. 356, 341 S. W. 2d 166*, R. 373-374.) This wording—now embodied in *28 U. S. C. §1348*, and still in effect—read when enacted as follows:

> "That all national banking associations under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases

[3] §39, ch. 646, Act of June 25, 1948, 62 Stat. 994.

> the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."[4]

In the light of the above legislative history, we now proceed to a consideration of the validity of the claimed repeal. Hereafter we will refer to these three enactments, respectively, as the 1875 act, the 1882 act, and the 1887 act, unless it is necessary to make specific reference to one of these statutes in a later phase of its history. As a rule, the changes in wording which these three statutes have gone through have little or no bearing on the issue here being considered. All of such changes have been minor variations in terminology, and have done nothing one way or the other to affect or vary the clear meaning of the respective statutes.

Since there has been no express repeal of the 1875 act, appellee must resort to a repeal by implication.

B. Repeal by implication is not favored and must be established by a clear and manifest intention, and appellee has failed to meet this burden.

The United States Supreme Court has, on various occasions, addressed itself generally to the subject of repeal by implication. One of its best pronouncements on that subject

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[4]This wording originally appeared as §4, ch. 373, Act of March 3, 1887, 24 Stat. 555. It was re-enacted as §4, ch. 866, Act of August 13, 1888, 25 Stat. 433. The portion following the semicolon was deleted by §24, ch. 231, Act of March 3, 1911 (paragraph 16), 36 Stat. 1092. By ch. 646, Act of June 25, 1948, 62 Stat. 933, the 1887 wording was again re-enacted, slightly modified, and placed in the Judicial Code. It reads as follows:

> (After a reference to certain specific actions not here relevant) "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the states in which they are respectively located."

For many years, the 1887 wording was contained in 28 U. S. C. §41 (16); the code citation was changed in 1948.

appears in *United States v. Borden Co.*, *308 U. S. 188, 198-199 (1939)*:

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest.' * * * It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 10 L. Ed. 987, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy'."

Likewise, in *State of Georgia v. Pennsylvania Railroad Co.*, *324 U. S. 439, 456-457 (1945)*, the court stated:

> "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy."

The guidelines thus laid down make it clear that appellee has a difficult burden to sustain his claim of repeal by implication. If any other reasonable course is available, there will be no resort to such a repeal. Before an earlier statute is to be held repealed—in whole or in part—by a later one, the two must deal with the same subject matter, there must be a "positive repugnancy" between the two, and there must be a "clear and manifest" expression of intent to repeal. Even when all these are present, so disfavored is the concept of repeal by implication that it will be extended

only as far as any repugnancy goes; if it is possible to salvage any portion of the previous enactment, it will be salvaged.

The impossibility of an implied repeal here is clearly shown by a careful consideration of the 1875 act and the two acts which are claimed to repeal it. In such a consideration, we must be careful to determine exactly what subject matter is involved in this case; how—or if—that subject matter is covered in each of the acts under consideration; and whether—as to the subject matter involved in this case—the acts in question could "co-exist". We will now make that analysis.

C. There is no conflict as to state court venue in the 1875 act as against the 1882 act.

The first question is one of subject matter. Were this a discussion of national bank litigation generally, we might become involved in some legislative confusion. However, we need not become so involved because there is only one question before the Court: what is the *venue* of a suit against a national bank brought in a state court? It is only to the legislation dealing with this question that our attention must be directed. And, in simplification of our task, the provisions relating to state venue came through the various legislative acts unscathed.

Venue and jurisdiction of course are different concepts, yet the two can be—and often are—dealt with in the same statute. Such statutes, typically, say that a particular type of case is to be heard in a certain type of court in a certain

place. An example of this is *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635 (1945).* Involved there was a statute reading as follows:

> "Any party to a proceeding under this chapter aggrieved by any order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the Natural Gas Company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. * * *"

This statute does not contain the words jurisdiction or venue; it deals solely with type of suit, type of court, and place of trial. In that, note how similar it is to the portion of the 1875 act under consideration here. In the *Panhandle* case, there was a belated challenge to the place of trial. This Court held such was a challenge to venue, and had been waived. It ruled (at *324 U. S. 638-639*):

> "We read §19(b) [the quoted statute] to invest all intermediate federal courts with the power to review orders of the Commission, provided, however, that if a Circuit Court of Appeals, rather than the Court of Appeals for the District of Columbia, is chosen, the parties may object that the particular circuit lacks the specified qualifications. Venue relates to the convenience of litigants. * * * The provisions of §19(b) plainly are of that character. * * * The general grant of authority in §19(b) to all the courts of appeal suggests that the question of which one should exercise the power in a particular case is a question of venue. * * * The objection of the City of Cleveland which came after judgment had been rendered came too late."

Thus, whatever else the 1875 act deals with, it definitely deals with venue of national bank cases in state courts. By

analogy to the *Panhandle* case, the fact that the 1875 wording provides, among other things, for *place* of trial is sufficient to sustain this. More than that, there has been a judicial construction by this Court which reaches the same conclusion and as this appellant believes is controlling. *(First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, discussed in this appellant's previous Brief.) There, the national bank was sued outside its county. It did not assert its right to be sued in its home county until after trial on the merits, and was held to have waived its right to be sued in its own county. Only venue can be so waived; that decision, therefore, construed the 1875 act as dealing with venue.

We submit that we have demonstrated that a provision relating to venue can (and usually does) exist in the same statute with provisions on jurisdiction; further, that the 1875 act did deal with the subject of venue of suits against national banks in state courts.

We now turn to the 1882 act which provided, essentially, that *jurisdiction* for suits involving a national bank would be the same as *jurisdiction* for suits involving a state bank located where the national bank in question was located. It also provided for the repeal of "all laws or parts of laws" inconsistent with it.[5]

It is plain that the 1882 act does not relate to the place where a suit against a national bank may be maintained in

[5]A general repealer clause such as this adds nothing on the question of whether a later statute repeals an earlier one by implication. Indeed, such clauses have been thought to demonstrate an intent to save those portions of prior legislation not inconsistent with a later act. See 82 C. J. S., Statutes, §285; 50 Am. Jur., Statutes, §520.

a state court. The understandable language of the statute shows this. The crucial word is jurisdiction. To say that the 1882 act deals with state venue requires that the word "jurisdiction" in the 1882 act be construed as meaning "jurisdiction and venue". If the meaning of the word "jurisdiction" in this statute is to be enlarged to include "venue", it can only be so enlarged through factors other than the clear statutory language; the language itself does not authorize it.

At the outset, then, we reach the applicability of one of the basic rules relating to repeal by implication: that the intention to repeal must be "clear and manifest". Applying this rule places any claim of repeal here in an insurmountable dilemma. If it is "clear and manifest" that Congress intended that the 1882 act should repeal the 1875 act, then how is it such result cannot be sustained by resort to the wording alone? And, if extrinsic matter is needed to support an intent to repeal, how can it be said such intent is "clear and manifest"?[6] This is a dilemma appellee cannot and has not overcome.

But even if it is felt necessary and permissible to go beyond the wording of the 1882 act, there still is no support

[6]To determine the effect of a statute, the first question has to do with the intent of the legislature. The first inquiry in determining that intent is to the language used. *Flora v. United States, 357 U. S. 63, rehearing denied, 358 U. S. 871, 362 U. S. 972 (1958).* If a statute is clear and unequivocal on its face, there is no need to resort to such things as legislative history. *United States v. Oregon, 366 U. S. 643 (1961).* It is thus thought that the need to resort to extraneous sources to interpret the 1882 act is inconsistent with its having a "clear and manifest" intent to repeal.

for a "clear and manifest" repeal of the state venue provision of the 1875 act. The intent of Congress in enacting the 1882 proviso is well known. It has been decided judicially by two decisions of this Court.[7] Basically, that intent was to withdraw from the federal courts jurisdiction over suits brought by or against national banks based purely on their status as federal instrumentalities. Congress intended that thereafter, if national banks were to resort to the federal courts, they must do so on the basis of diversity or federal question jurisdiction in the same way that state banks, non-banking corporations, and individuals had to do. There is no doubt that the statute effected this intent. To that extent, then, the 1882 wording was inconsistent with (and thus repealed) those portions of the 1875 act—if any—which gave or purported to give the federal courts jurisdiction to hear all cases involving national banks. But that is as far as it went. An intent to put national bank and state bank litigation in courts of the same type for jurisdictional purposes is not inconsistent with the federal government's retaining a restriction on the venue of national bank litigation in state courts. The two intents can co-exist perfectly. Suppose, for example, the statutes of a particular state required suits involving five hundred dollars or more to be brought in that state's county courts. A suit against a national bank in the state courts would—by reference to state law—be brought in the county court; this would make

[7] *Continental National Bank v. Buford, 191 U. S. 119 (1903); Leather Manufacturers' Nat'l. Bank v. Cooper, 120 U. S. 778 (1887).*

the suit, for jurisdictional purposes, the same as one involving a state bank in that state.[8] But in determining which county court from a geographic standpoint, reference can still be made to federal law without violating the concept of identical jurisdiction for state bank and national bank litigation.

The fact that the 1875 venue requirement and the 1882 act can exist side by side negatives any "positive repugnancy" between the two acts. It negatives any "clear and manifest" intent to repeal. "When there are two acts upon the same subject, the rule is to give effect to both if possible."[9] Since it is possible to give effect to both acts, the claim of repeal by implication fails.

There is one further point. If the word "jurisdiction" in the 1882 act is interpreted as broad enough to encompass venue in state suits, it must certainly be broad enough to encompass venue in federal suits as well. If the word "jurisdiction" is held to have done away with all federal restrictions on state jurisdiction-and-venue in national bank suits, it must necessarily do away with all particularities of jurisdiction-and-venue in national bank suits in federal courts. Yet no federal decision has held the 1875 venue require-

[8] Insofar as the 1882 act required a reference to state laws to determine jurisdiction of national bank suits in state courts, it only continued a situation which had existed under previous legislation. Note, for example, the reference to state jurisdiction in the 1875 act, and in §57 of the 1864 legislation.

[9] *United States v. Borden Co.*, supra, *308 U. S. at 198.*

ments inoperative in federal courts.[10] This precedent as regards federal litigation is of long standing and should not be lightly disregarded.

For all the above reasons, it is clear that appellee has not and cannot meet the heavy burden imposed upon him to establish an implied repeal of the 1875 act by the 1882 act.

D. The 1875 act vs. the 1887 act; A complete divergence of subject matters.

Appellee has not seriously contended before this Court that the 1887 act (now *28 U. S. C. §1348*) operated to repeal the 1875 act. The Supreme Court of Texas, however, relied on §1348, not as having repealed the 1875 act, but as having limited it to suits against a national bank commenced in a federal court.[11] For that reason, it is appropriate to consider that contention.

The 1887 act, when enacted, provided in essence that for the purpose of actions by and against them, national banks would be deemed citizens of the states in which they are located. This enactment has likewise been construed as having an intent similar to that of the 1882 act: to prevent national banks from using federal courts solely because of their status as federal instrumentalities.[12] That being true, most of the things said about the 1882 act apply as well to the 1887 act. An intent to restrict the national banks' right

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[10] *Cope v. Anderson, 311 U. S. 461, 467 (1947); Buffum v. Chase Nat'l. Bank, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952); Leonardi v. Chase Nat'l. Bank, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677; International Refugee Organization v. Bank of America, 86 F. Supp. 884 (S. D. N. Y. 1949); Schmitt v. Tobin, 15 F. Supp. 35 (D. C. Nev. 1935); Swift v. Fourth National Bank of Columbus, Georgia, 205 F. Supp. 563, 565 (M. D. Ga. 1962).*

[11] R. 373-374; *161 Tex. 356, 341 S. W. 2d 161.*

[12] *Continental Nat'l. Bank v. Buford, 191 U. S. 119 (1903).*

to use federal courts does not necessarily conflict with a restriction on the venue of national bank suits in state courts. As has been pointed out, the two can co-exist.

The Texas Supreme Court chose not to rely on the original enactment of the 1887 act, but to rely instead on the simultaneous express repeal of the 1882 act, and re-enactment of the 1887 act as *28 U. S. C. §1348*. This took place in 1948.[13] This 1948 activity, the Texas court reasoned, showed that §1348 "did not actually repeal" the 1882 act, but re-enacted it in different language, indicating the intention of Congress to limit *12 U. S. C. §94* so as to apply only in federal courts. No reason is given for this conclusion, nor is any authority cited in support of it.

As to its state court venue requirement, the 1875 statute is still in effect, and the Texas Supreme Court erred in refusing so to hold.

II. A RECENT TEXAS DECISION DEMONSTRATES THAT THIS SUIT CANNOT BE A LOCAL ACTION UNDER THE RULE OF CASEY V. ADAMS.

In his brief (pp. 28-34), appellee contends that this suit is a local action by state statute, within the rule of *Casey v. Adams, 102 U. S. 66 (1880)*. Appellant's position on this is discussed in its brief (pp. 33-35) and its reply brief (pp. 14-16). Appellee's basis for his claim that this suit is a local action is that it is made so by statute. The statute relied on reads:

> "New Lawsuits. The Court of competent jurisdiction of the county in which the delinquency proceedings are

[13] See Notes 3 and 4.

pending under this Article shall have venue to hear and determine all action or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."[14]

We have previously shown that the determination of whether an action is "local" or "transitory" under *Casey v. Adams* is a matter of federal law, a guide to which is set out in the *Casey v. Adams* opinion itself.[15] But in any event, a recent decision by the Texas Supreme Court holds that even as a matter of state law actions by the statutory insurance receiver-liquidator are not "local" in any sense.

It is *Langdeau v. Burke Investment Company*, decided June 20, 1962, by a unanimous Texas Supreme Court.[16] The *Burke Investment* case involved an alleged conflict between the above-quoted Texas statute [§4(f), Article 21.28, Insurance Code of Texas], and the Texas statute providing that suits involving land "must be brought in the county in which the land, or a part thereof, may lie."[17] The *Burke Investment* case involved land situated in Bexar County, Texas. It was instituted against the insurance receiver, who attempted to remove it to Travis County, the county where delinquency proceedings were pending. The Texas Supreme

[14]Section 4(f), Article 21.28, Insurance Code of Texas, General and Special Laws of Texas, Acts 54th Legislature, Regular Session, 1955, ch. 267, p. 737, 742.

[15]See Reply Brief of Appellant Republic National Bank, pp. 14-16; also Mercantile National Bank's Reply Brief on the merits, p. 10.

[16]*C. H. Langdeau, Receiver v. Burke Investment Co.,* Tex. , 358 S. W. 2d 553 (1962), affirming 351 S. W. 2d 287 (Tex. Civ. App., San Antonio, 1961).

[17]Article 1995 (14), Revised Civil Statutes of Texas.

Court held that Bexar was the proper county because the mandatory venue statute relating to land overcame the *permissive* provision of the Insurance Code quoted above. In referring to the Insurance Code section, the Texas Supreme Court ruled:

> "It does not provide that the actions mentioned therein shall or must be brought in the county where the receivership is pending. Venue to hear and determine the proceedings is conferred upon the courts of that county, but there is *nothing* to suggest that the lawmakers intended for such courts to have exclusive venue of all suits by or against the receiver. Exception 28a, which contains language of similar import, has been held to be permissive and not mandatory. *Mutual Fire & Automobile Ins. Co. v. Kirkham*, Tex. Civ. App., 231 S. W. 2d 459 (no writ). As pointed out by the court in that case, a declaration that 'venue shall lie' in a certain county is not equivalent to a command that the suit 'must be brought' in that county. It merely signifies an intention to give the plaintiff the legal right, if he chooses, to maintain such a suit there. This, it seems to us, is the meaning which should be attributed to the provisions of Section 4(f)."[18]

The significance of this opinion is that the Texas Supreme Court has definitively held that the Texas statute (which appellee contends in this case is mandatory) is not mandatory but is permissive. That statute does not prescribe exclusive venue in Travis County; thus, there is no basis even under appellee's theories of "locality" on which it can be said this is a statutory local action. The *Casey v. Adams* exception does not apply.

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[18] *Tex. , 358 S. W. 2d 554-555.*

CONCLUSION

For the reasons stated herein, and those stated in its original and reply briefs, appellant Republic National Bank of Dallas respectfully submits that the judgment of the Supreme Court of Texas is erroneous and should be reversed, and the cause remanded with a direction that the Texas Supreme Court order the transfer of appellee's action against this appellant to Dallas County, Texas, pursuant to the provisions of *Title 12, U. S. C., § 94.*

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SUPREME COURT, U. S.

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No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I.C.T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLANT MERCANTILE NATIONAL BANK AT DALLAS

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On Appeal From the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLANT MERCANTILE NATIONAL BANK AT DALLAS

Appellant wishes to amplify the previous discussion of a question raised by a Justice at the first oral argument* herein, and briefly discussed at that time (part I, pp. 2-8 hereof). Also, since the first argument of this case in February, 1962, the Texas Supreme Court has handed down a decision pertinent to the contentions involved in this case, to which appellant wishes to refer (part II, pp. 8-10 hereof). This supplemental brief is accordingly submitted for consideration in conjunction with (and in no way superceding) its previous briefs filed herein before the previous argument.

*This Court heard oral argument in this case, as No. 90 in the October 1961 term, on February 28 and 29, 1962. In April, 1962, the case was restored to the calendar for reargument and placed on the summary calendar. 369 U.S. 834.

I. The Federal statute relating to venue of actions and proceedings against national banking associations was not repealed by federal legislation enacted in 1882 or by any later federal legislation.

Appellee has argued in its brief (Brief for the Appellee, pp. 26-28) and in oral argument that the Act of July 12, 1882 (22 STAT. 162), repealed the federal venue statute involved herein, 12 U.S.C. §94 (1940 ed.) (REV. STAT. §5198; 18 STAT. 320; 36 STAT. 1167). We have previously discussed some matters pertinent to this argument in our earlier briefs (Brief for the Appellant, pp. 42-45; Appellant's Reply Brief on the Merits, pp. 4-9). In view of the inquiry of a Justice at the argument as to our position with respect to this contention of appellee, we wish to amplify our previous discussion.

The statutory provision originally enacted as Section 57 of The National Bank Act (1864), 13 STAT. 116, provided:

> "[S]uits, actions and proceedings, against any [national banking] association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. * * *."

This provision was re-enacted as a part of Section 5198 of the Revised Statutes, by the Act of February 18, 1875 (18 STAT. 320). It was included in the United States Code as 12 U.S.C. § 94 by the 1926 codifiers, and appears as such today.

The nature of the right granted under this statute to a national bank against whom a suit was brought in a state court was described by this Court as "a personal privilege that [a national banking association] could waive", and, again, as "a personal privilege, which it could claim or not, as it deemed necessary." *First National Bank v. Morgan*, 132 U.S. 141, 145 (1889).

The statute which appellee claims repealed the foregoing venue provisions is the proviso of Section 4 of the Act of July 12, 1882 (22 STAT. 163)—herein called for convenience "the 1882 Act"—which reads as follows:

> "[T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

The 1882 Act was superceded by a provision contained in Section 4 of the Act of March 3, 1887 (24 STAT. 554)—herein for convenience called "the 1887 Act"—which provided in part:

> "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases

> the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."

To correct the enrollment of the 1887 Act, Congress enacted an identical law, the Act of August 13, 1888 (25 STAT. 436), herein for convenience called "the 1888 Act".

Important to any consideration of the 1882 Act is the historical background and the then-existing situation, to which the legislation was addressed.

In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) this Court expressly recognized that under the United States Constitution Congress had the power to vest jurisdiction in inferior federal courts in cases coming properly within the description of "cases arising under the laws of the United States." In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) this Court held that Congress had by express enactment vested this jurisdiction in federal courts as to the Second Bank of the United States, and that such legislation was constitutional. However, the Act of March 3, 1875 (18 STAT. 470) was the first general act by which Congress granted to lower federal courts general jurisdiction in "cases arising" under the laws of the United States. As a result of the grant in 1875 of this "federal question" jurisdiction, since national banks were created by Congress a suit by or against them was "necessarily a suit arising under the laws of the United States" and cognizable (if involving the $500 jurisdictional amount) in the federal courts. *Petri v. Com-*

mercial National Bank, 142 U.S. 644 (1892); see *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). And, though the legislation described the federal jurisdiction which it conferred as being "concurrent with the courts of the several States," the statute provided for removal from state courts to federal courts of all "federal question" cases for which jurisdiction was therein established.

The important consequence of this legislation was, thus, that in all cases of $500 or more and involving national banks (1) the banks could for the first time commence in the federal court all actions in which they were plaintiffs; and (2) there was created a previously non-existent right of removal to the federal court of all state-court actions against national bank defendants whether diversity of citizenship existed between the parties or not.

This existing situation, by which national banks were enjoying, as a practical matter, exclusive federal jurisdiction in cases involving over $500, was the situation which led to the enactment of the 1882 Act, and was the state of affairs to which it was directed. There was no reason for the legislation to deal, and by its terms it did not deal, with state court venue of actions against national banks, under Section 57 of the National Bank Act (1864) or the reenactment thereof in Rev. Stat. § 5198.

We note at the outset that nothing in the 1882 Act purports in express terms or by implication to repeal Rev. Stat. § 5198, except insofar as Rev. Stat. § 5198 might have been

interpreted to provide for federal court subject-matter jurisdiction broader (for instance, by not providing a jurisdictional amount) than the subject-matter jurisdiction applicable to all corporations whether federally-created or not. Section 5198 created a waivable venue privilege, which a defendant national bank "could claim or not, as it deemed necessary." *First National Bank v. Morgan*, 132 U.S. 141, 145 (1889). Such a venue privilege is to be distinguished completely from a non-waivable pre-requisite concerning "jurisdiction". The 1882 Act refers solely to "jurisdiction of suits hereafter brought by or against national banks," the phrase appearing twice therein; the statute itself indicates a subject matter quite unrelated to the venue provisions of Rev. Stat. § 5198. Lastly, it is to be noted that Rev. Stat. § 5198 relates to venue of "suits, actions and proceedings *against*" national banking associations, in federal *and* state courts, whereas the 1882 Act was concerned with federal court jurisdiction only, but of suits *by and against* national banks, suits *by* national banking associations not having been dealt with by Rev. Stat. § 5198.*

The 1882, 1887 and 1888 Acts have been treated as relating to federal court jurisdiction, since their enactment. The material parts of the legislation were carried forward as paragraph 16 of § 24 of Chapter Two of the Judicial Code of 1911. 36 STAT. 1092. Said Chapter Two is headed "District Courts—Jurisdiction". The same statutory provisions are carried forward as § 1348 of the Judicial Code of 1948, similarly headed.

*Emphasis ours throughout.

We have found five principal decisions of this court concerned with the application of the 1882, 1887 and 1888 Acts:

Leather Manufacturers' Nat. Bank v. Cooper, 120 U.S. 778 (1887);

Whittemore v. Amoskeag National Bank, 134 U.S. 527 (1890);

Petri v. Commercial National Bank, 142 U.S. 644 (1892);

Continental National Bank v. Buford, 191 U.S. 119 (1903);

Hermann v. Edwards, 238 U.S. 107 (1915).

The *Amoskeag Bank* case involved the original jurisdiction of the federal courts, the others the removal jurisdiction. None of these decisions dealt with the specific question of whether the 1882 Act in any way affected the venue provisions of The National Bank Act of 1864 and Rev. Stat. § 5198.

It is plain, however, from all these decisions that the sole purpose, aim, and effect, of the 1882, 1887 and 1888 Acts was to eliminate federal court jurisdiction of actions by and against national banks, insofar as based on the federal-origin theory of federal questions as expounded in *Osborn v. Bank* and authorized by the federal-question jurisdiction statute of 1875. The correctness of the analysis to this effect, which we have set forth above, is strongly suggested by this Court's decision in *Petri v. Commercial*

National Bank. And it is virtually confirmed explicitly by this Court's decision in *Continental National Bank v. Buford*, wherein it was said (191 U.S. at 123-124):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by, and exercised their powers under, acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" [Citing *Ex parte Jones*, 164 U. S. 691 (1896)].

Analysis of the statutes now embodied in 12 U.S.C. § 94, and of the 1882, 1887 and 1888 Acts, in terms of the language employed in the statutes themselves, the purposes to which they were directed, and their subsequent treatment and interpretation by this Court and the draftsmen of the Judicial Codes of 1911 and 1948—all demonstrate that appellee's argument for repeal in 1882 of the state venue provisions now appearing in 12 U.S.C. § 94 is insupportable.

II. The Texas Supreme Court has now held that the Texas statute involved in the present case provides only for permissive venue. That decision destroys any basis for appellee's "local action" argument herein.

Appellee has argued to the effect that the Texas statute, Section 4 (f) of Article 21.28 of the Insurance Code of Texas, *required* that "suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding" is pending (Appellee's Brief, pp. 28-34, 13-16). From these

arguments appellee reached the forced conclusion that by reason of the Texas statute his action was a "local action" to which the provision of Rev. Stat. § 5198 (12 U.S.C. § 94) was not applicable under *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880).* Such contention was repeated in appellee's oral argument in February 1962, and at that time reference was made to a case then pending before the Texas Supreme Court in which it would expressly construe and apply the Texas statutory provision contained in Section 4 (f) of Article 21.28 of the Insurance Code of Texas, the Texas statute on which appellee based his arguments relating to this matter.

In June, 1962 the Texas Supreme Court decided the case to which appellee referred. *Langdeau v. Burke Investment Company*, 358 S.W.2d 553 (1962).** That decision became final when rehearing was denied July 25, 1962. The Texas Supreme Court's holding to the effect that the Texas statute merely provides for permissive venue of suits by and against the insurance receiver-liquidator refutes completely appellee's argument that the case at bar is a "local action" under *Casey v. Adams*.

Burke Investment Company as plaintiff had sued the receiver in a state district court in Bexar County, Texas at San Antonio. The receiver contended that by reason of the provisions of Section 4 (f) of Article 21.28 of the Insurance Code of Texas, which he there (as here) asserted

*Discussed in our opening brief, p. 34; and our reply brief, pp. 9-12.
**Not yet officially reported.

was mandatory, the case was required to be transferred to the state district court in Travis County, Texas in which the delinquency proceeding against the insurer was pending. The trial court at San Antonio denied receiver Langdeau's contention. In upholding this action the Texas Supreme Court commented as to Section 4 (f):

> "It does not provide that the actions mentioned therein shall or must be brought in the county where the receivership is pending. Venue to hear and determine the proceedings is conferred upon the courts of that county, but there is nothing to suggest that the lawmakers intended for such courts to have exclusive venue of all suits by or against the receiver. Exception 28a, which contains language of similar import, has been held to be permissive and not mandatory. *Mutual Fire & Automobile Ins. Co. v. Kirkman*, Tex. Civ. App., 231 S.W.2d 459 (no writ). As pointed out by the court in that case, a declaration that 'venue shall lie' in a certain county is not equivalent to a command that the suit 'must be brought' in that county. It merely signifies an intention to give the plaintiff the legal right, if he chooses, to maintain such a suit there. This, it seems to us, is the meaning which should be attributed to the provisions of Section 4 (f)."

358 S.W.2d at 554-555.

In its opinion in the case at bar the Texas Supreme Court expressly stated that it was not passing on the question of whether or not the receiver's action herein is a "local action". (R. 396) Now in *Langdeau v. Burke Investment Company* the Texas Supreme Court has plainly decided that the Texas statute on which appellee based his arguments did not create a "local action", even as that term is defined in the argument of appellee.

CONCLUSION

In the present case there is a state statute relating to venue and a federal statute on the same subject. The Texas Supreme Court concluded that "this is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes." (R. 369) By this sweeping generalization the Texas Supreme Court would simply eliminate the application of—or even judicial review relating to the application of—the Supremacy Clause of the Constitution of the United States.

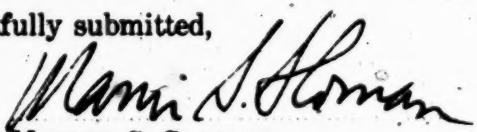
A comparable problem was involved in the recent case of *Free v. Bland*, 369 U.S. 663 (1962), wherein this Court held in language literally applicable to the case at bar:

> "The Supreme Court of Texas's interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211."

In the case at bar the Supremacy Clause of the Constitution of the United States requires that the federal venue statute here involved must prevail over the Texas venue statute.

For the reasons stated by appellant herein, and in appellant's prior briefs, the judgment of the Texas Supreme Court herein should be reversed, and the cause should be remanded with a direction that the Texas Supreme Court order transfer of appellee's action against appellant to a state civil district court in Dallas County, Texas.

Respectfully submitted,



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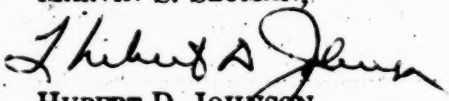

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OCTOBER TERM, 1962

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v.

C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
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Appellee.

On Appeal from the Supreme Court of Texas

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On Appeal from the Supreme Court of Texas.

SUPPLEMENTAL BRIEF OF APPELLEE C. H. LANGDEAU, RECEIVER

Appellee respectfully submits this Supplemental Brief in response to Supplemental Briefs filed herein by both Appellant National Banks.

I.

HISTORICAL BACKGROUND OF NATIONAL BANKS

The first National Bank was chartered by Act of Congress in 1791, 1 Stat. 181, and was known as "The Bank of the United States." Its Charter was allowed to expire without renewal in 1812.

The second Bank of the United States was created by Act of Congress in 1816. This Charter was for a term of twenty years and was allowed to expire during the administration of Andrew Jackson without renewal or extension in 1836.

There were no National Banks in existence from 1836 until 1863, when Congress, on February 25, 1863 (12 Stat. at L. 668) enacted the present National Banking Act, which has come down to us with amendments to the present time.

JURISDICTION AND VENUE OF SUITS

The Charter for the Bank of the United States, granted by Congress in 1791, expressly authorized the Bank "to sue and be sued * * * in any Court of record, or in any other place whatsoever." 1 Stat. 181.

The Supreme Court of the United States in *Bank of the United States v. Deveaux, 5 Cranch 85 (1809)*, decided that the foregoing language of the Charter enacted in 1791 did not give the United States Circuit Court jurisdiction, since the then existing Judicial Acts did not otherwise extend the jurisdiction of the Circuit Courts to include the Bank. The

Court stated that this power granted to the corporation, "* * * is not understood to enlarge the jurisdiction of any particular Court * * *."

The Charter of the second National Bank of the United States took into account the decision in the *Deveaux* case and contained the following additional language, "be made able and capable in law to sue and be sued * * * in all State Courts having competent jurisdiction, and in the Circuit Courts of the United States." This additional language of the second Bank's Charter was the outgrowth of the *Deveaux* case.

In *Osborn v. Bank of the United States, 9 Wheaton 204 (1824)*, Chief Justice Marshall held that the new and additional language contained in the Charter of the second National Bank authorized the Bank to sue and be sued in the Circuit Courts of the United States, and that Congress had the constitutional power to enact the Legislation.

Mr. Justice Bradley of this Court, in *Claflin v. Houseman, 13 U. S. 130, 23 L. Ed. 833, 838 (1876)*, had the following to say with reference to the *Deveaux* case:

> "The case is exactly the same as that of the bank of the United States. The first bank chartered in 1791 had capacity given it 'to sue and be sued * * * in Courts of record or in any other place whatsoever.'" (1 Stat. at L. 191.)
>
> "It was held in *Bank v. Deveaux, 5 Cranch 61*, that this did not authorize the Bank to sue in Courts of the United States, without showing proper citizenship of the parties in different states. The Bank WAS OBLIGATED TO SUE IN THE STATE COURTS." (Em-

> phasis supplied.) * * * "The second Bank of the United States had express authority 'to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' * * * In the case of *Osborn v. The Bank of The United States* it was objected that Congress had not authority to enable the Bank to sue in Federal Courts, merely because of its being created by an Act of Congress, but the Court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State Courts."

Quite naturally when the first National Banking Act was passed on February 25, 1863, it not only included the language "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," (12 Stat. 668, Sec. 11, * * * FOURTH); but it also contained the language that had been thought necessary as a result of the *Deveaux* case to give the Federal trial Courts jurisdiction, as follows (12 Stat. 681, Sec. 59):

> "And be it further enacted that suits, actions and proceedings by and against any association under this Act, may be had in any Circuit, District or Territorial Court of the United States held within the district in which such association may be established."

This was not a venue statute, but undoubtedly was considered necessary to give jurisdiction as a result of the historical experience in the case of the *Bank of the United States v. Deveaux*. This language was supposed to give the Circuit Court, District and Territorial Courts jurisdiction that they would not otherwise have possessed.

Since the *Deveaux* case it seems to have been thought necessary to specifically authorize suits by or against the

Bank of the United States in State Courts, although no case had ever decided that they did not have jurisdiction, by reason of the authority and power "to sue and be sued, in any Court of law and equity, as fully as natural persons." The original National Banking Act of 1863, which had not mentioned State Courts, was repealed and the Act of 1864 was passed, which included the following language (13 Stat. 116, Sec. 57):

> "That suits, actions and proceedings against any association under this Title may be had in any Circuit, District, or Territorial Court of the United States held within the District in which such association may be established, or in any State, County or City in which said association is located, having jurisdiction in similar cases."

It is the position of the Appellee, from a historical viewpoint, that it was thought necessary to expressly give the State Courts jurisdiction. This was not a matter of venue. This is a part and parcel of the same Section that granted jurisdiction to the Federal Courts.

It is Appellee's position that Congress was affirmatively granting authority for suits in Federal and State Courts, believing it to be necessary because of the *Deveaux* case, and was not attempting to limit the Courts in which suits might be brought by or against National Banks. This point is made because Congress possessed no power to enlarge the jurisdiction of State Courts which they possessed under their respective Constitutions and Statutes.

It is Appellee's further position that the following language which first appeared in substance in the Charter of

the first Bank of the United States, and which has been a part of all subsequent Charters and National Banking Acts, is the real affirmative authority for National Banks to sue and be sued in Federal and State Courts as fully as natural persons or private corporations:

> "To sue and be sued, complain and defend in any Court of law and equity, as fully as natural persons." (12 U.S.C. Sec. 24, 1940 Ed.; 12 St. at L. Page 668, Sec. 11; 13 St. at L. Page 101, Sec. 8; Revised Stat. of U. S., Sec. 5136.)

It is respectfully submitted that 12 U.S.C. Sec. 24, * * * FOURTH, authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," has at all times authorized and empowered State Courts otherwise having jurisdiction to entertain suits by and against Banks, and that the further language contained in 12 U.S.C., Sec. 94, with reference to State, County and Municipal Courts was unnecessary and was intended as an affirmative grant of authority rather than a restriction on the jurisdiction of State Courts.

II.

DECIDED CASES

The first decision concerning the present Statute (12 U.S.C., Sec. 94) was *Casey v. Adams, 102 U. S. 66, 26 L. Ed. 52 (1880)*, specifically held that the Statute was not applicable to a suit filed in a State Court in Louisiana to foreclose a mortgage on real property; the suit being filed in the Parish in which the land was located. The National Bank was located in another Parish, and was made a party

defendant and urged that it had to be sued in the County where the Bank was located. The Supreme Court overruled the National Bank's plea, and held that this was a "local action" and that the Statute was not applicable. Likewise, the Supreme Court in *First National Bank v. Fellows, Ex Rel Union Trust Company, 61 L. Ed. 1233 (1917)*, speaking through Chief Justice White, decided that a quo warranto proceeding instituted at the State Capitol in Michigan in Ingram County could be sustained against the National Bank located in Bay City, Bay County, Michigan. The Bank urged that it could only be sued in its own County, and Mr. Justice Vandeventer in his dissent expressly asserts that in his opinion the Act of 1864 (now 12 U.S.C. Sec. 94) should have controlled.

Appellants urge the case of *First National Bank of Charlotte, N. C. v. Morgan, 132 U. S. 141, 33 L. Ed. 282 (1889)*. It is respectfully submitted that this case does not decide the point. This was a suit by Morgan against the National Bank to enforce the penalty created by Act of Congress for charging usurious interest. (Revised Statutes of United States, Section 5198.) It will be recalled that at this time the language of 12 U.S.C., Sec. 94 was a part of this Usury Section of the Federal Statute. The suit was in a State Court in Cleveland County, North Carolina. The Bank appeared and made a defense to the suit without first entering a plea to the jurisdiction of the Court or the venue. After losing the case in the trial Court, the National Bank asserted, for the first time, on appeal, that it could only be sued in the County where its Bank was located. Mr. Justice

Harlan delivered the opinion of the Court and stated that it was a suit to recover penalty incurred under a law of the United States. He then went on to hold that the Bank had waived its privilege to be sued in the County of its location, and that the State Court in the other County had jurisdiction. Since the right or privilege of the Bank, if it had such, was waived, this case does not decide the point.

The next case chronologically is *Bank of America v. Whitney Central National Bank, 261 U. S. 171, 67 L. Ed. 594*, wherein Justice Brandeis expressly refused to determine this very question in the following language:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

Finally, *Cope v. Anderson, 331 U. S. 461, 91 L. Ed. 1602 (1946)*, makes passing reference to 12 U.S.C., Section 94, although it was not in any way involved in the decision of the case.

The foregoing are all of the cases that deal with the particular Statute in question.

III.

12 U.S.C. REPEALED BY THE PROVISO TO THE ACT OF JULY 12, 1882

The amendment of February 18, 1865 (18 Stat. at L. 320; Section 5198 of the Revised Statutes of the United States), which has come down to us as 12 U.S.C., Sec. 94, if it is

to be construed as a restriction on State Court jurisdiction, was repealed by the Act of July 12, 1882 (22 Stat. at L. 162), which first authorized the extension of Charters to National Banks for an additional twenty years, and then stated:

> "Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778, 30 L. Ed. 816 (1887)*, this Court stated with reference to this Act of 1882:

> "This was evidently intended to put National Banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the Courts of the United States."

However, the language of the Act itself was not limited to jurisdiction of the Courts of the United States, but refers to "jurisdiction of suits thereafter brought by or against (national) banks 'shall be the same as, and not other than, the jurisdiction for suits by or against Banks not organized under the laws of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun.'"

It is true that the only cases reaching the Supreme Court of the United States relating to this enactment involved the right of removal from State Courts to Federal Courts, and no decision exists with reference to whether this Act of 1882 repealed the conflicting part of Section 5198 of the Revised Statutes of the United States (1874) as amended by the Act of February 18, 1875. (18 Stat. 320.)

This Act of 1882 was not repealed by Congress until June 25, 1948, when in passing the new Judiciary Act, it expressly included the proviso to the Act of July 12, 1882, in a long list of Statutes to be repealed, effective September 1, 1948.

As a matter of fact, this Act of 1882 was a part of the Banking Act and not a part of the judiciary provisions, and there is no indication as to why it was included in the repealing provision.

However, if it effectively repealed the predecessor of 12 U.S.C., Sec. 94, its subsequent repeal sixty-six years later would not re-enact 12 U.S.C., Sec. 94.

This Act of July 12, 1882 was, of course, passed after the decision in *Casey v. Adams (1880)*, and was not relied upon by the Court.

In *The First National Bank of Charlotte, N. C. v. Morgan, 132 U. S. 141, 33 L. Ed. 282*, decided by the Supreme Court in 1889, the Court expressly excludes consideration of the Act of July 12, 1882, 22 Stat. 162, 163, Sec. 4, in the following language:

> "That proviso refers only to suits by or against National Banking Associations brought after the passage

of that Act. The present suit was commenced before that date."

IV.

A "NO-MAN'S LAND" AREA WHERE NO COURT HAS JURISDICTION

If the constructions urged on this Court by Appellants is adopted, then Congress will have created an effective "no-man's land" area where no Court, Federal or State, has jurisdiction.

This is well illustrated in the case of *Okeechobee v. Florida National Bank, 150 So. 124 (Fla. 1933)*, in which two National Banks, both necessary parties to the suit, were defendants. These two Banks were located in different Counties. The Florida Court effectively described the intolerable situation that would be created by such a construction of the Federal Statute, as follows:

> "If this be not true, then the Complainant below in this case, the appellant here, can never enforce its legal rights for the alleged breach of the contract. Both Banks are necessary parties to the suit. The suit could not be maintained against one under the allegations of this bill of complaint without the other being joined in that suit, and if the Florida National Bank of Jacksonville may not be sued upon its joint contract in Okeechobee County and People's Bank of Okeechobee cannot be sued on its joint contract in Duval County, then there is no jurisdiction in which the complainant may maintain its suit."

This was a case where the two National Banks were necessary parties to the suit, and the presence of both Banks was required before the State Court could proceed.

Other illustrations are not difficult to find. Suppose a National Bank sues in a State Court for title to real property located in a County different from that in which the Bank is located. Historically, as well as by Statute, such suits must be brought in the County or District wherein the real property is located. The Texas Statute on this subject, Article 1995, Section 14, Texas Revised Civil Statutes, 1925, states that such suits "must" be brought in the County where the land is situated. This must be true in most, if not all, of the other States of the Union. Yet, Appellants are saying that when a National Bank sues or is sued for title to real property, the suit must be brought in the County wherein the Bank is located. If under State practice, the suit cannot be brought in such County, then no Court, Federal or State, would have jurisdiction of such cause.

Another example is a suit in which a County is a party defendant, and which under local practice must be brought in such County. In Texas this is governed by Article 1995, Section 19, Texas Revised Civil Statutes.

A further example is a suit in which an Administrator of an Estate of a deceased person, or a guardian, is a party defendant, which commonly must be brought in the County wherein the administration or guardianship is pending.

A suit for mandamus against the head of a department of State Government is required in Texas to be brought in Travis County (State Capitol), Article 1995, Sec. 20, Texas Revised Civil Statutes.

Suits to revise the proceedings of the County Court in matters of probate must be brought in the District Court of the County in which such proceedings were had. Article 1995, Section 18, Texas Revised Civil Statutes.

V.

RECENT DECISION OF THE SUPREME COURT OF TEXAS

Appellants submit the recent decision by the Supreme Court in *Langdeau v. Burke Investment Co., 358 S. W. 2d 553 (1962)*. It is asserted that this decision completely refutes the argument that the case at bar is a "local action" under *Casey v. Adams*. Land has always occupied a unique position in the history of man and in the history of the jurisprudence, and it is not surprising to find that the Supreme Court of Texas holding that the venue statute governing suits concerning the title to land controls over all other sections of the venue statute.

The *Burke Investment Company* case in no way holds or implies that Art. 21.28 of the *Insurance Code of Texas*, as Amended (Acts of 1955, 54th Legislature, Pages 737, 742, Chapter 267, captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers," Section 4(f), does not control the venue in this particular lawsuit which does not involve the title to land. In fact, in this very case, *Langdeau v. Republic National Bank of Dallas, 161 Tex. 349, 341 S. W. 2d 161*, the Supreme Court of Texas held that

venue is fixed and controlled in Travis County by the Texas Statutes, which read:

> "Sec. 4(f) NEW LAWSUITS. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

Article 21.28 of the *Insurance Code of Texas*, Section 1(f), in which the word "Court" is defined as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this article, means the Court in which the delinquency proceeding is pending."

Except in the single instance of the suit involving title to land (*Langdeau v. Burke Investment Company*), the Courts of Texas have held that Article 21.28 of the *Insurance Code of Texas* fixes and controls venue in the County where the delinquency proceedings are pending. *Bouknight v. Williamson, 314 S. W. 2d 429 (Writ of Error Dismissed); Atkins v. Wheeler, 307 S. W. 2d 294 (Writ of Error Dismissed); Johnson v. Wheeler, 312 S. W. 2d 266.*

Casey v. Adams, 102 U. S. 68, 26 L. Ed. 52 (1880), held that the predecessor of 12 U.S.C.A., Section 24, was not intended by Congress "to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. * * * and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either *by statute* (emphasis supplied) or the common law, unless it was expressly so declared * * *."

The present case is made a "local action" by statute.

It is respectfully submitted that this particular case is made a "local action" by the *Insurance Code of Texas*, and that this is not changed by the decision of the Supreme Court of Texas in the *Burke Investment Company* case involving the title to land.

CONCLUSION

Appellee respectfully prays that the Court find that the 98th District Court of Travis County, Texas, the County in which the delinquency proceeding against I.C.T. Insurance Company is pending, has jurisdiction to hear and determine this cause, and that for all of the reasons set out herein 12 U.S.C., Section 94, does not control the jurisdiction or venue of this proceeding.

Respectfully submitted,

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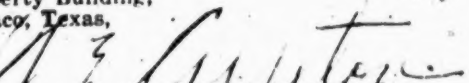
By 
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PROOF OF SERVICE

I, W. E. CURETON, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December , 1962, I served copies of the foregoing Brief of Appellee on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,
v.
C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.
No. 14

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,
v.
C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.
No. 15

APPELLANTS' MEMORANDUM AFTER REARGUMENT

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APPELLANTS' MEMORANDUM AFTER REARGUMENT

Colloquy occurred at the reargument on December 5, 1962, concerning certain points of Texas venue practice not raised or briefed previously herein, and collateral to the federal issue before the Court. Appellants, in accordance with the direction of the Chief Justice, respectfully submit this memorandum concerning those points.

1. Transfer as to appellants only—the only relief herein sought—is authorized and required by Texas practice. Rule 89 of the Texas Rules of Civil Procedure provides:

> "If a plea of privilege is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for, the same will be subject to trial at the expiration of ten days after the mailing of notification to the parties or their attorneys by the clerk or any party or his attorney that the papers have been filed in the court to which the cause has been transferred."

Under this rule, upon sustaining appellants' venue pleas, this cause as to each appellant—at least—should be trans-

ferred as to it. *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65 (1942), syllabus 4. Each appellant seeks only such a transfer. Each appellant opposes here, and would have opposed in the Texas courts, transfer of appellee's whole cause to Dallas County, Texas. Upon a holding by this Court that appellants' venue pleas should have been recognized below, appellants urge that this Court should reverse the judgment below and remand the cause with a direction that the Texas Supreme Court order the cause as to each appellant transferred to a civil district court of Dallas County, Texas. 28 U.S.C. § 2106; opening brief of Mercantile National Bank, p. 46; opening brief of Republic National Bank, p. 46, and Supplemental Brief, p. 17.

2. **Transfer of causes as to non-complaining defendants can be had upon consent and in the discretion of the Texas court.** Following the sustaining of appellants' pleas of privilege, as to any defendants (other than appellants) who do not object to transfer, transfer of the cause as to them upon the application of plaintiffs or upon their application lies in the discretion of the court in Texas. The court *may* transfer under such circumstances by inclusion of the action as to any such defendants with the action being transferred under Rule 41 of the Texas Rules of Civil Procedure:

> "* * * Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission

> to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately."

We emphasize that we are discussing here only a question of power of the Texas courts, and each of appellants would object to the trial of the charges by appellee herein in any manner other than seperately as to it, in Dallas or elsewhere.

3. Appellant ostensibly could have maintained original Dallas venue without consent of any defendant, under Texas venue statutes. Without the consent of any defendant, appellee—as stated by appellee's counsel at the re-argument herein—could have originally proceeded to cast venue of this action in Dallas County, Texas, in compliance with 12 U.S.C. § 94 upon which appellants rely and in accordance with appropriate Texas venue provisions. Art 1995, subd. 4, Texas Revised Civil Statutes:

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:
>
> "• • •
>
> "4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides. The transfer or assignment of a note or chose in action shall not entitle any subsequent holder to sue thereon in any other county than that in which suit could have been prosecuted if no assignment or transfer had been made."

Appellee's ostensible right to maintain venue under this statute would be subject to pleading and proof by evidence

at a venue hearing of court-made as well as statutory facts upon which the exception is authorized. *Stockyards Nat. Bank v. Maples*, 127 Tex. 633, 95 S. W. 2d 1300 (1936).

4. Appellee would have had the right under his theories of his action (disputed by appellants) to urge transfer to Dallas of this whole cause, heretofore or upon a remand, but has chosen not to take the necessary steps to do so. Over the objection of any defendant, *and* assuming the correctness of appellee's contentions as to the nature of his action, appellee might earlier have taken steps to seek transfer of this whole cause upon a sustaining of appellants' pleas of privilege. *Tunstill v. Scott, supra*, authorizes transfer as to all defendants upon sustaining of the pleas of privilege of any of them, in an action in which plaintiff seeks only joint relief against the defendants. Appellee has sworn upon this record (R. 339) that his action is "joint" for venue purposes. We emphasize, however, without arguing the point here, that we disagree with that characterization by appellee of the nature of his action. Each appellant herein would oppose transfer of this cause as to any other defendant herein, on the ground that appellee has not shown by evidence that he has a cause of action against any defendant for joint relief, as well as that the action is not solely for joint relief as evidenced by the petition alone (R. 1, 315-321). Compare *Stedman v. International Harvester Company*, 319 S. W. 2d 791 (Tex. Civ. App.) with *International Harvester Company v. Stedman*, 159 Tex. 593, 324 S. W. 2d 543 (1959).

In any event, however, appellee has elected not to follow the Texas procedure necessary to force a transfer of this cause as to other defendants not consenting, even under his theory that his action is for "joint" relief. To get such transfer appellant is required to have served a copy of his controverting affidavit on each defendant as to whom he wants the action transferred along with the action against a complaining defendant. The record herein reflects no such service and, such requirement of service being jurisdictional as to defendants, other than the non-complaining defendants it can not now be transferred as to them. *Tunstill v. Scott, supra*. See 38 TEX. L. REV. 345 (1960).

Respectfully submitted,

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Appellee.
No. 15

APPELLEE'S SUPPLEMENTAL BRIEF AFTER RE-ARGUMENT

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In the

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OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS, *Appellant*, v. C. H. LANGDEAU, RECEIVER FOR I.C.T. INSURANCE COMPANY, *Appellee*.	No. 14
REPUBLIC NATIONAL BANK OF DALLAS, *Appellant*, v. C. H. LANGDEAU, RECEIVER FOR I.C.T. INSURANCE COMPANY, *Appellee*.	No. 15

APPELLEE'S SUPPLEMENTAL BRIEF AFTER RE-ARGUMENT

The following question arose during the argument of this cause concerning Texas Venue practice, and the Chief Justice asked that supplemental briefs be filed by each side on the point.

I.

The Question: IF THE SUPREME COURT OF THE UNITED STATES SUSTAINS APPELLANTS' POSI-

TION AND UPHOLDS THE ABSOLUTE PRIVILEGE OF THE TWO NATIONAL BANKS TO BE SUED IN DALLAS COUNTY, TEXAS, WILL THE ENTIRE CAUSE WITH ALL DEFENDANTS BE TRANSFERRED TO DALLAS COUNTY, OR, IN THE ALTERNATIVE DOES THE TRIAL COURT, IN HIS DISCRETION HAVE THE POWER TO TRANSFER THE ENTIRE CAUSE AS TO ALL DEFENDANTS TO DALLAS COUNTY, TEXAS.

II.

The inquiries with reference to the particular point grew out of the following statements made by counsel for Appellants.

Appellants in their statement to the Court insisted that in the event this Court sustains the Appellants' position herein, the entire cause of action as to all defendants will be transferred to Dallas County, or, at the very least, the trial Court would have the discretion to transfer the entire cause as to all defendants to Dallas County, and if this be true, Appellee's argument would be untenable.

III.

Appellants in their "Memorandum after Reargument," seem to have abandoned the position they took on this point during oral argument. They now say that under Rule 89, Texas Rules of Civil Procedure, "Upon sustaining Appellants' venue pleas, this cause as to each appellant—at least—should be transferred as to it * * *. Each Appellant seeks

only such a transfer. Each Appellant opposes here, and would have opposed in the Texas Courts, transfer of Appellee's whole cause to Dallas County, Texas."

Appellee submits that Appellants have abandoned their position, because the law of Texas governing venue is contrary to the position that Appellants orally took before this Court in oral argument.

RULE IN TEXAS

Venue in Texas is governed by Statute and not by Court Rule; the Court Rules only conform to the Statutes.

The rule of law governing this very point was announced by the Commission of Appeals in an opinion adopted by the Supreme Court of Texas in *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65, as follows:

> "The established rule as to transferring a cause when the plea of privilege of one of several defendants is sustained is stated by Chief Justice Alexander, when Justice of a Court of Civil Appeals, in Johnson v. First National Bank of Brenham, Tex.Civ.App., 42 S. W. 2d 870, 871, as follows: 'The rule seems to be that, where one of several defendants files a plea of privilege to be sued in the county of his residence, and the plea is sustained, if the cause of action is a joint action growing out of joint liability of all the defendants, the suit must be transferred as an entirety to the county of the residence of the defendant whose plea is sustained. On the other hand, if the cause of action against the several defendants is severable, or joint and several, the court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained, and should transfer the suit in so far as it concerns the defendant whose plea is sustained'."

This rule is reiterated by the Supreme Court of Texas in *International Harvester Company v. Stedman*, 159 Tex. 593, 324 S. W. 2d 543, 545.

The Court also points out that the rule originated in the case of *Johnson v. First National Bank of Brenham*, 42 S. W. 2d 871.

A JOINT AND SEVERAL CAUSE OF ACTION

Appellee's petition in this cause alleges a joint and several cause of action against defendants, charging them as joint conspirators.

In *State v. Standard Oil Company*, 130 Tex. 213, 107 S. W. 2d 550, Chief Justice Cureton, of the Texas Supreme Court, states with reference to a conspiracy action:

> "An 'actionable civil conspiracy' is a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. Under the conspiracy charges of the petition, if proven, each of defendants in error is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination."

In *Massey v. Farnsworth*, 353 S. W. 262 (Tex. Court of Civ. App.), the Court announces:

> "Conspirators are jointly and severally liable for all damage resulting from the conspiracy, each being responsible for the acts of the other in furthering the common design."

In *Solomon v. United States*, 276 Fed. 2d 669, Sixth Circuit, the Court states:

> "It is well settled that the liability of conspirators is joint and several liability."

Thus, under the rule of the Supreme Court of Texas announced in *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65, "if the cause of action against the several defendants is severable, or joint and several, the Court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained and should transfer the suit in so far as it concerns the defendant whose plea is sustained."

In this case, if the position of the Appellant National Banks is sustained, the trial Court must retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained (and the defendants who did not file pleas of privilege).

IV.

Appellants now urge in their "MEMORANDUM AFTER REARGUMENT" that Appellee could have initially filed suit against all defendants in Dallas County under Article 1995, Section 4, Revised Civil Statutes of the State of Texas, 1925, as an alternative to filing suit in the District Court of Travis County, Texas, the County and Court in which the delinquency proceedings were pending pursuant to the provisions of Article 21.28, Sec. 4(f), Texas Insurance Code.

It is respectfully submitted that this was not an acceptable alternative under the unusual and strict requirements of Article 1995, Section 4. This Section of the Texas Venue

Statute requires that the plaintiff, in limine, on the hearing on the plea of privilege, prove by a preponderance of the evidence, not only that one of the defendants is a resident of the County wherein the suit is filed, but also he must prove by a preponderance of the evidence his cause of action against such resident defendant. *Stockyards National Bank v. Maples*, 127 Tex. 633, 95 S. W. 2d 1300; *Hammonds v. Houston Electric Company*, 169 S. W. 2d 765.

In a case as complex and difficult as is the case at bar, with as many defendants, a plaintiff would be foolish to accept the hazards of having to prove his case on the merits by a preponderance of the evidence on the hearing on the plea of privilege at such an early stage of the proceeding, because if for any reason he should fail at this stage to sustain his cause of action by a preponderance of the evidence against the resident defendant, the venue would fail and all of the pleas of privilege that would undoubtedly be filed in this cause would immediately be good. The resulting proliferation of the cause by the sustaining of innumerable pleas of privilege would make the trial of this cause, from a practical standpoint, impossible.

This was the purpose of the Texas Insurance Code, 21.28, Sec. 4(f), which made it expressly possible to sue all of the defendants in Travis County without the necessity of proving in limine by a preponderance of the evidence a cause of action against any of the defendants. Under this Section of the Statute the Court is only required to determine that at

the time of the commencement of the suit delinquency proceedings under the provisions of Article 21.28, Sec. 4(f), Texas Insurance Code, were and are still pending in the Court and County wherein the suit was instituted, and that the suit was commenced by the statutory liquidator. *Bouknight v. Williamson*, 314 S. W. 2d 429 (Writ of Error Dis.).

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PROOF OF SERVICE

I, W. E. CURETON, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 11, 1962, I served copies of the foregoing supplemental brief on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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